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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1962.

STATE OF MISSOURI,
Plaintiff-Appellee,

vs.

W. A. BROOKSHIRE,
Defendant-Appellant.

Case No. 48,488.
No. 351

DOROTHY C. CONTESTIBLE, Administratrix of Estate of Ralph Burton Collings, Deceased,
Plaintiff-Appellee,

vs.

W. A. BROOKSHIRE,
Defendant-Appellant.

Case No. 48,581.
No. 352

On Appeal from Division 2 and Division 1 of the Supreme Court of Missouri.

JURISDICTIONAL STATEMENT.

W. A. BROOKSHIRE,
Missouri State Penitentiary,
Pro Se.

ST. LOUIS LAW PRINTING CO., INC., 415 N. Eighth Street. CEntral 1-4477.

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DOROTHY C. CONTESTIBLE, Administratrix of Estate of Ralph Burton Collings, Deceased, Plaintiff-Appellee, vs. W. A. BROOKSHIRE, Defendant-Appellant.	Case No. 48,581.

On Appeal from Division 2 and Division 1 of the Supreme Court of Missouri.

JURISDICTIONAL STATEMENT.

Both of the above styled cases are based upon the killing of Ralph Burton Collings by the appellant in Boone County, Missouri on May 25, 1959. Both cases were filed in the Circuit Court of Boone County, Missouri; a change

of venue of No. 48,488 was ordered by the Circuit Judge to Cole County, Missouri where it was tried April 26-29, 1960; a change of venue was ordered by the same judge to the Circuit Court of Audrain County, Missouri where it was tried July 27-29, 1960 in No. 48,581.

In Case No. 48,488 an information was filed in Boone County charging the appellant with First Degree Murder (Tr. pp. 2-3); a verdict finding the appellant guilty of manslaughter and assessing punishment at three years in the penitentiary was returned by the jury April 29, 1960 (Tr. p. 583); a motion for a new trial was filed June 7, 1960 (Tr. pp. 586-609); **a hearing on this motion was held and testimony of Larry Woods, the prosecuting attorney was taken by appellant** (Tr. pp. 610-619); the motion was overruled (Tr. pp. 619-620); and on the same day, August 25, 1960, an appeal was taken and an appeal bond in the sum of $5,000 was given by appellant (Tr. pp. 620-622); the appeal was briefed and argued September 28, 1961; January 8, 1962 affirmed per curiam; a copy of the opinion is filed appendix A; a motion for a rehearing was filed January 23, 1962 and suggestions in support of motion for rehearing or in the alternative to transfer to court en banc filed February 8, 1962. On February 12, 1962 appellants motion for a rehearing or to transfer to court en banc overruled and on April 3, 1962 a notice of appeal to this court was filed.

In Case No. 48,581, a suit for damages was tried July 27-29 in the Circuit Court of Audrain County, Missouri, and a verdict signed by ten jurors was returned for $17,000 (Tr. p. 399); a motion to set aside verdict and judgment and to enter a judgment in favor of defendant was filed August 12, 1960 (Tr. p. 400) and a motion for a new trial filed August 12, 1960 (Tr. pp. 401-413); Court failed to rule these motions and by default they were considered overruled; notice of appeal filed November 16, 1960; Case

briefed and argued before Division 1 of the Supreme Court of Missouri September 29, 1961; January 8, 1962 Judgment affirmed per curiam; **a copy of this opinion filed is made appendix B**; motion for a rehearing or to transfer to court en banc filed January 23, 1962 and suggestions in support of motion for rehearing filed February 8, 1962; **Motions overruled March 12, 1962**; Notice of appeal to this court filed April 6, 1962.

Both cases (48,488 and 48,581) stemmed from the same killing. On page nine of appendix B the following statement is found, **"The jury had the right to disbelieve State v. Brookshire, Mo. Sup. Cts. S. W. (2d), (handed down concurrently herewith), and evidently did disbelieve defendant's testimony in justification." This means that both Divisions conferred and concurred in the decisions reached.**

Rule 15 (3) provides "where several cases are appealed from the same court that involves identical or closely related questions it shall suffice to file a single jurisdictional statement covering all the cases." For these reasons a single jurisdictional statement is being filed.

These appeals are filed pursuant to 28 U. S. 1257 (2) and 1254 (1).

CONSTITUTIONAL PROVISIONS AND STATUTES.

The pertinent portions of the United States Constitution involved in this appeal are:

Amendment IV, Amendment V, Amendment VI and Amendment XIV, Section 1; and the portions of the Constitution of the State of Missouri are Article 1, Sections 10, 15 and 18a, all of which are set forth verbatim as appendix C.

STATEMENT OF FACTS.

Testimony of W. A. Brookshire.

By Mr. Cleek.

Q. Now. You are listed here as the defendant W. A. Brookshire, that's right, isn't it?

A. That is my name.

Q. You are often referred to as Senator Brookshire, were you in the State Senate?

A. I was.

Q. That is here in the State of Missouri?

A. That's right, it was from the 26th Senatorial District.

Q. And I believe at one time you were Superintendent of Schools, were you not?

A. Yes. For six years I was Superintendent of Schools.

Q. And you graduated from law school and practiced law for a number of years did you not?

A. I did.

Q. And I believe that you reside on the premises that has been referred to as the W. A. Brookshire farm which is located on U. S. Highway 63 South about 10 miles south of Columbia, Missouri, is that correct?

A. That is correct.

Q. **And you are retired from the active practice of law and have been for a number of years, haven't you?**

A. That's right.

Q. And you took up farming?

A. That's right. I have always farmed.

Q. I will ask you Senator, do you recall the date of May 25, 1959, the date that is mentioned in this evidence? I will ask you if at that time you saw the deceased, Ralph Collings, on your back porch and if so what was his demeanor and if he had anything in his hand?

A. Well I saw him, he was about 14 or 15 feet away from my kitchen door. He had this hammer, the large

hammer in his hand and he called to me, "I am coming in and kill you, you son-of-a-bitch." I told him to stop. He didn't stop. He came on. The kitchen door was closed. **He took the hammer, smashed the door, broke the glass out of the door, the upper part of the door was glass. He came on through. He came into the kitchen. I had this pistol on the table in the dining room. I went and got that pistol.** I tried to get him to stop. He kept threatening to kill me. He would strike at me with this hammer. I retreated into the dining room a distance of about 12 feet. He was coming at me. **He swung a glancing blow that struck me on the left wrist. He swung at my head. I felt the wind from the hammer. I got the pistol off of safety. I had never taken it off of safety.** I fired. I thought I missed him. I supposed that I had. He swung and hit me a blow on the right shoulder. I fired again. I fired two times in succession. He kept coming until the last shot was fired. They were fired almost simultaneously. He stopped, held the hammer in his right hand, stood there for—I don't know, seemed to me two or three minutes, made two steps and fell, the hammer fell ahead of him, fell into the kitchen.

Q. How old are you?

A. I am past sixty-eight.

Mr. Cleek, you may inquire (Tr. pp. 439-441).

Q. (By Mr. Cleek) You don't have a telephone at your farm residence, do you?

A. No, sir, I do not.

Mr. Cleek, you may inquire."

Cross-examination of appellant:

"Q. What type of personal hearing did you contemplate?

A. I wanted a Coroner's jury to come down to my place and take the testimony and bring out the facts.

Q. Immediately?

A. Yes (Tr. p. 453).

Q. That is what they were there for; they were to make the investigation and get the facts; isn't that right, isn't that why they were there?

A. I THOUGHT THEY WERE THERE TO INVESTIGATE BUT INSTEAD OF THAT THEY PLACED ME UNDER ARREST AND TOOK ME AWAY FROM THERE.

Q. That was after you refused to answer some questions?

A. No. They immediately placed me under arrest" (Tr. p. 455).

"Q. Would you demonstrate how he was swinging that sledge at you?

A. He was swinging like that (demonstrating).

Q. I believe you, and you were backing off just like that?

A. Yes, sir. Just like you did" (Tr. p. 462).

QUESTIONS PRESENTED BY THIS APPEAL.

Did the conduct of the officers in procuring the weapons, pictures and other evidence placed in evidence by the State violate Amendments IV, V, VI and XIV, Section 1 of the United States Constitution?

The question is substantial. **The testimony shows that soon after the appellant killed the deceased he took the pistol used to an upstairs bedroom more than 40 feet from where the body was lying and out of sight** (Tr. p. 452): that the appellant within a few minutes after the killing called two farm hands, Harold Hayman and Harvey Beavers and went to a public telephone and called the sheriff's office; that within a half hour two deputies, Theron Duncan and Pearlie Lukehart together with the county Coroner came to appellants farm home and were invited into the house and were shown the body of the deceased (Tr. pp. 139-140).

The appellant demanded a hearing by a jury because he had the deputies sued and knew they would distort what he said (Tr. p. 458); **a hearing was refused and within five minutes the appellant was arrested without a warrant, handcuffed and taken to the County jail (Tr. pp. 425-426).**

The Coroner Vincent Perna testified as follows:

Questions by W. A. Brookshire,

"Q. When you came to my home and asked a question or two, what did I tell you?

A. You told me and you repeatedly told me that you would give me no information concerning the circumstances surrounding the death of this man unless I called out a jury and had an immediate hearing.

Q. I demanded an immediate hearing, is that right?

A. Yes.

Q. You were the Coroner of the County weren't you?

A. Yes.

Q. You had me removed in order that you could make an investigation independently of me didn't you?

A. No, I didn't have you removed at all.

Q. You testified at the preliminary hearing didn't you?

A. Yes, I did.

Q. On page 280, I will read the question and your answer:

Q. So when he demanded a hearing what did you tell him?

A. I don't recall exactly what I said to him then. Deputy Sheriffs Duncan and Lukehart were both in the house and it was just about this time that **Mr. Brookshire was told that he was being placed under arrest in order that we might complete our investigation"** (Tr. pp. 97-98, (48,581)).

Theron Duncan testified (Tr. pp. 139-173).

Direct examination by Mr. Woods, the prosecuting attorney:

"Q. Will you state your name please?

A. Theron Duncan.

Q. On May 25, 1959 Mr. Duncan what was your occupation?

A. Deputy Sheriff, Boone County, Missouri.

Q. On that day, May 25, 1959, did you receive a call from the defendant with regard to a body at his house?

A. I did.

Q. After you received this call what did you do?

A. I talked with Mr. Lukehart, Criminal Deputy, and we decided if there was a body out **there it might be well to contact the Coroner and take him out with us.**

Q. Did you contact the Coroner?

A. We did.

Q. Who is the Coroner?

A. Dr. Vincent Perna.

Q. Did you pick him up and take him with you?

A. Yes.

Q. Did you three proceed immediately to the farm?

A. We did.

Q. How long did it take to get to the farm from the time you received the call?

A. I could only estimate that Mr. Woods. I imagine it was around approximately thirty minutes, or a little better from the time we received the call.

Q. When you got on the porch what did you do?

A. Knocked at the door, and I knocked again very loudly and shortly Mr. Brookshire opened the door.

Q. What did you say to him?

A. He said, "Come in," at that time.

Q. Did you go in?

A. Yes, sir.

Q. Where was the defendant?

A. Led the way across the room into what is called a kitchen.

Q. Did Dr. Perna and deputy Lukehart follow you in there?

A. Yes, sir.

Q. What did you find in the kitchen?

A. Well just as you pass through the dining room there was a dead body laying on the floor, or a body laying on the floor face down facing to the south with its feet almost at the door entrance to the kitchen.

Q. Was the defendant in the kitchen with you?

A. Yes, he was.

Q. And did you ask him what had happened?

A. Yes.

Q. What did he say?

A. Well he demanded a hearing.

Q. Did he tell you what happened?

A. I believe Dr. Perna, at that time asked him again what happened here, Mr. Brookshire?

Q. What did he say?

A. It will all come out in the investigation.

Q. Did anyone there ask him about either Dr. Perna or you or deputy Lukehart ask him where the gun was that caused the man's death?

A. I believe Dr. Perna did.

Q. What was defendant's answer?

A. It would be produced at the proper time.

Q. Now after he made these answers to your questions, what did you do with him?

A. We placed him under arrest.

Q. And was he taken from the premises?

A. Yes, he was.

Q. Where to?

A. Removed from the premises and taken to Mr. Lukehart's car, to the Boone County jail.

Q. By whom?

A. Mr. Lukehart.

Q. Now that day was there a Coroner's Jury summoned to the scene?

A. **Yes, there was a coroner's jury arrived out there about, well, it was over an hour, Mr. Woods. I don't recall.**

Q. Over an hour after when?

A. After Mr. Brookshire was placed under arrest and taken to the Boone County jail.

Q. All right. And when the coroner's jury got there, where were they taken?

A. When the coroner's jury arrived, Dr. Perna and myself were standing outside the premises. **We had remained outside the premises after Mr. Brookshire was removed until the jury arrived back.**

The Court: **Did you see anybody touch anything?**

The Witness: **No one was in the house, Your Honor.**

Q. Now after the coroner's jury had arrived, Mr. Duncan, **did you make a search of the upstairs portion of the house?**

A. Yes, sir.

Q. **And did you find anything in that bedroom in the vanity table which would have relation to this case?**

A. Yes, I did.

Q. What did you find?

A. **I found in the top drawer of this in the right hand side which was apparently a vanity, an automatic small caliber pistol laying in a drawer.**

Q. Did you touch that pistol?

A. No, sir.

Q. I hand you State's Exhibit 10 Mr. Duncan. Does that picture represent the pistol in the drawer as it looked when you opened the drawer?

A. It does.

Q. **Did you find any ammunition in the house?**

A. **Yes, there was some ammunition, live ammunition.**

Q. That is what I mean, live ammunition. Where did you find it?

A. In a bedroom on the south part of the house.

Q. **How many bedrooms upstairs, how many rooms upstairs?**

A. **As I recall, there are four.**

Q. This gun I believe you testified was found in the east.

A. In the east one where there was a bed.

Q. The ammunition was found in the south room?

A. In the south room where there is also a bed.

Q. Where in the room did you specifically find it?

A. In a drawer.

Q. What caliber ammunition was there?

A. .32.

Q. Was this a .32 caliber pistol?

A. I found later it was" (Tr. 139-153).

Lt. James Rhodes testified for the State (Tr. 228-279). On pages 230 and 231 is found the following:

"Q. (By Mr. Woods) **Did you go up stairs to the east bedroom?**

A. Yes, sir.

Q. And did you examine the desk or vanity table located in that bedroom?

A. Yes, sir.

Q. Did you find any weapon in that vanity table?

A. Yes, sir.

Q. What kind of a weapon did you find?

A. A .32 caliber Colt automatic present in the top right drawer.

Q. And who was present when you first saw this gun?

A. I am not certain. There were one or possibly more of the other officers present.

Q. **Was Sgt. Runkle there?**

A. Yes, sir. He was there. **He took photographs of the gun before it was touched.**

Q. I hand you State's Exhibit 10. Does that scene portrayed in that photograph correctly show the position and location of the gun when you first saw it in the drawer?

A. Yes, sir."

Mr. Woods: I offer State's Exhibit 10 into evidence (Tr. 230-231).

Deputy Sheriff Lukehart testified in both cases in 48,488, pp. 173-228, and 48,581, pp. 33-64 and pp. 129-197.

In cross-examination by defendant:

"Q. Now then I told you not to go through my house without a search warrant, didn't I?

A. You did.

Q. But you did, didn't you?

A. Yes, we did" (Tr. 56).

A motion to suppress the testimony was filed, Tr. pp. 19-22, and was overruled on page 23. **That a copy of said motion is filed Appendix D.** "And thereafter on the same day, April 26, 1960, Motion to Quash information, **to Produce, and to Suppress are presented to the Court.** And the Court having considered the evidence and being fully advised in the premises, overruled the Motions of defendant as follows. **Motion to Suppress Evidence,** Motion to Quash Information **and Motion to Produce"** (Tr. p. 23).

"Mr. Cleek: Your Honor, while they are doing that, I would like to ask a few preliminary questions as to the admissibility of some of the things.

The Court: Are you raising the questions as heretofore raised preliminary to trial?

Mr. Cleek: Yes.

The Court: Hasn't that been adjudged?

Mr. Cleek: I believe that it should be raised again.

The Court: I think not. You have got the question squarely lodged in the case and it is not a matter for the jury to decide. **It is for me to decide**." (Tr. ps 236).

The question was raised in Assignment 15 in the Motion for a New Trial, page 601, and was assigned in Appellant's brief, pp. 64-66.

This Court has ruled the question in U. S. v. Rabinowitz, 70 Sup. Ct. 430; in Mapp v. Ohio, 81 Sup. Ct. 1684 and Marcus v. Search Warrants of Property, 81 Sup. Ct. 1708.

That the Attorney General's brief on page 8 recited the record: "The defendant on April 26, 1960 (pp. 19-22), filed a Motion to Suppress evidence. This motion was substantially the same motion filed in the Magistrate Court (pp. 6-8) and alleged in substance that defendant had been unlawfully arrested by officers Duncan and Lukehart. And that other officers had unlawfully seized certain personal property consisting of a .32 pistol, five cartridge casings and spent missiles (p. 20). **This motion went on to allege that the evidence described had been seized as a result of unlawful search and seizure and in violation of State and Federal Constitution** (R. 21). This motion was again denied (R. 23)."

Did the trial Court in denying Appelland's Motions to Quash the jury and grant a change of venue to him (Tr. pp. 61, 122-123, and 130) in view of the prejudice shown (Tr. pp. 36-138), violate Amendments VI and XIV, Section 1 of the United States Constitution? The question is substantial and important. The record shows one entire day was spent and 96 pages of the record were consumed in the qualification (Tr. 24-120). Page 6 of the brief filed by the Attorney General recites: "On April 25 (R. 19) the trial Court had issued a special venire ordering the sheriff to summon additional talesmen and on April 26, 1960, **the**

trial commenced with a panel of 33 jurors present. The Voir Dire was extensive and is included in the record (R. 24-120). During the course of the Voir Dire one of the panel was asked if he could approach the case with an open mind (R. 60). Telesman Wolfrum answered (R. 61, lines seven and eight), "**We had dealings, he gave me a twenty-five dollar bad check.**" **Defendant thereupon orally challenged the array (R. 61) and moved for a mistrial.** The Court then asked the entire panel (R. 62-63) whether Wolfrum's remark had prejudiced them in any way **and stating that no response was forthcoming (R. 63) directed counsel to proceed** (R. 63). **At the close of the Voir Dire, defendant again challenged the array moving in writing to quash the panel** (R. 122-123). This motion was denied (R. 124). The entire panel was admonished and excused until 9:00 A. M., April 27 (R. 124-125). Defendant then moved to Quash the jury which had been impanelled (R. 130) which was refused (R. 133). The witnesses were requestered (R. 138) and the trial began."

Assignments 12 and 13 in Appellant's Motion for a New Trial (Tr. pp. 595-600), containing copies of the motions directed against the jury are Appendix E.

In addition to the original 33 jurors summoned before the trial commenced, there were 51 additional jurors summoned and examined (Tr. pp. 50-120).

Examination of juror Suthoff revealed the following (Tr. pp. 37-40):

"Mr. Cleek: In your interest, did you find out that the State had filed a first degree murder charge against Mr. Brookshire?

Juror Suthoff: Through the news media, yes (Tr. 37-38).

Mr. Cleek: Would you tell me the names of the persons you remember?

Juror Suthoff: Must I?

The Court: I think you ought to, yes.

Juror Suthoff: This case has been a general subject of discussion among many people. **If I were to give you a list of all the names I don't think my memory would be good enough to list all of the people because it has been a matter of discussion for some time.**

Mr. Cleek: Since the newspaper article was printed, and I assume you are talking about the Jefferson City paper, is that right?

Juror Suthoff: Yes (Tr. p. 40).

Mr. Cleek: Now this question pertains to reading about the death of Mr. Collings in the newspaper at any time, especially after the shooting was supposed to have occurred. Is there anybody else?

Juror Baessen
Juror Groner
Juror Reithel
Juror Hogg
Juror Amos
Juror Propst
Juror Griffen
Juror Schneider
Juror Langerhans
Juror Farmer
Juror Davis
Juror Goe
Juror Busch
Juror Tharp
Juror Chappel
Juror Salisbury (Tr. p. 48).

Juror Donaldson: **Do you have to serve on this jury? Are you compelled to?** (Tr. p. 62).

Mr. Cleek: (Outside of hearing of the jury) **Of course, the defendant takes exception to the Court not declaring a mistrial and that the whole panel should be quashed. The defendant takes exception to the comments made by the Court to this jury panel** (Tr. p. 63).

The Court: How did you gain that opinion?

Juror Lamare: Through the newspapers.

The Court: Is it such an opinion as would bias or prejudice your mind if I told you you had to try this case on the law and the evidence?

Juror Lamare: **It would be an opinion against the defendant, I am afraid** (Tr. p. 68).

Mr. Cleek: Did you read the newspaper articles that we have been referring to?

Juror Donaldson: Yes.

Mr. Cleek: Do you know of any reason why that you couldn't sit in this type of case?

Juror Donaldson: **No. The only reason is I just don't care to. I'd rather not.**

The Court: I wish I were home too. I don't think she is going to say she is not. You are willing to serve if it's necessary, are you not?

Juror Donaldson: **I will if I have to.**

The Court: You may have to" (Tr. pp. 90-91).

The Court: THERE IS A JUROR.

Mr. Cleek: What is your name?

Juror Wolfrum: Paul Wolfrum.

Mr. Cleek: **Mr. Wolfrum, you feel in all good conscience you could sit on this jury if you were so selected and sit upon it with an open mind?**

Juror Wolfrum: No, sir! I believe I would be——

The Court: **Do you know something about this case?**

Juror Wolfrum: No.

The Court: **Then why would you be prejudiced?**

Juror Wolfrum: Well, I just——

Mr. Cleek: Have you heard certain things?

Juror Wolfrum: I just feel the word conscientious and your own conscience and I couldn't be charged the way I feel. **I don't want to be excused.** I AM NOT AFRAID OF THAT but I had my mind made up the way I actually feel toward the man and toward everything about it.

The Court: YOU MEAN YOU HAVE YOUR MIND MADE UP ABOUT THIS MAN BEFORE YOU HEARD ANYTHING ABOUT THE CASE?

Juror Wolfrum: **We had dealings. He gave me a twenty-five dollar bad check.**

Mr. Cleek: (Outside the hearing of the jury) **Mr. Wolfrum in open court has made remarks that are prejudicial to the defendant and inflammatory that the jury, the entire jury panel heard. And I ask the Court to declare a mistrial and the jury panel be quashed** (Tr. pp. 60-61).

The Court: Have a seat. I assume that all of the jury heard that last remark made by the juror whom I have just excused. This man is charged with murder in the first degree. **Of course, the remark that was made there has not the slightest thing to do with the charge here. What that juror said might have occurred a thousand times** (Tr. pp. 62-63).

Mr Brookshire: If the Court please, I want to make a statement. A man named, I believe, Wolfrum, made a statement that I gave him a bad check for twenty-five dollars. **I never saw that man until yesterday in my life.**

The Court: **I think I can make it plain to this jury that you are being tried for this offense and not another.** I THINK I KNOW HOW TO DO THAT.

Mr. Brookshire: There was a man named Suthoff who I don't know him. I never saw the man until he appeared in the courtroom.

Mr. Cleek: **There were so many things upon voir dire that were inflammatory and prejudicial against the defendant singularly and taken together it constitutes prejudice in the entire panel towards this defendant.**

The Court: I think you will remember with what celerity I excused anyone who exhibited any prejudice.

Mr. Brookshire: Yes, you did, **but he already implanted the poison** (Tr. p. 131).

Motion to Quash Jury.

Comes now the defendant and moves the Court to quash the 12-member jury selected to hear the trial of this cause for the following reasons:

1) That said 12-member jury was selected from a jury panel that was not properly impaneled according to law.

2) That said jury was selected after improper statements and questions were propounded to them by the prosecuting attorney for the State on the voir dire examination.

3) That this jury was selected after inflammatory and prejudicial statements toward the defendant were made by members of the panel in full hearing of each other during voir dire examination.

Filed April 27, 1960 (Tr. p. 130).

The Court: The motion will be overruled (Tr. p. 133).

Ninety-four jurors were examined and 98 pages of testimony was taken to obtain 12 jurors (Tr. pp. 24-122).

The record shows clearly that such prejudice existed against the appellant that the Motion to Quash should have been sustained and appellant's motion for a change of venue should have been sustained. Irvin v. Dowd, 81 Sup. Ct. 1639 so rules.

Did the trial Court by coaching the prosecuting attorneys and by personally eliciting and emphasizing evidence favorable to the State violate Amendments V, VI and XIV, Article 1, of the United States Constitution? This question is substantial and important.

Juror Wolfrum stated untruthfully that the appellant had given him a twenty-five dollar bad check. The Court stated: **"What that juror said might have occurred a thousand times"** (Tr. p. 63).

This statement before any testimony was offered showed definitely the Court's prejudice toward the appellant. **The appellant has pending a suit for damages against Wolfrum for committing perjury.**

On Tr. page 397 the Court during the examination of a medical witness stated: "This case might some time be looked at by another Court," indicating a conviction.

Tr. pages 397-404 shows how the trial Court coached the prosecuting attorneys using this language on page 400: **"I think you are getting on very, very dangerous ground."** And on page 402: **"I want the State to prove its case, but in doing so I don't want the State to get itself in trouble."**

The Court: He is not being asked about that now. He is being asked whether the two chest wounds, as I understand, would cause death instantly. SOME TIME AGO HE TESTIFIED, **as I recall it, and I heard no objection, that the man would be rendered immediately unconscious. Is that right?**

The Witness: That is correct, sir.

The Court: And he would die in a matter of minutes, did you say that?

The Witness: That's correct.

The Court: **And I heard no objection to it** (Tr. p. 407).

This attitude of the Court clearly shows his intense interest in the case and how prejudiced he was in favor of the State.

On page 631 of the transcript it will appear how the trial Court directed the reporter in making the transcript.

This Court has held many times that a trial Judge must show no prejudice nor partiality. Smith v. U. S., 161 U. S. 85, very definitely rules this point.

Did the attorney who defended the appellant, by denouncing him in his argument to the jury deprive the

appellant of due process of law and thus violate Amendments V, VI and XIV, Section 1, of the United States Constitution? This question is substantial.

Lyman Cleek, attorney for appellant, in his argument to the jury in the criminal case 48,488 used the following language: "This man is a lot of a fake. He is a lot of things. He has the same right **even those good people**, those people testified that his . . . oh, my goodness" (Tr. p. 371).

Those good people were people who had testified that the appellant's reputation for truthfulnes was bad. Cleek had failed to cross-examine these witnesses as he had been instructed by the appellant for the purpose of showing the witnesses were personal enemies of the appellant and were committing perjury. Webster defines fake as "a person passing himself off as what he is not; **a fraud.**" Undoubtedly a jury could not be expected to acquit a man so denounced by his attorney! **It was intended to deny to appellant a fair and impartial trial and to deprive him of due process of law.** Hawk v. Olsen, 326 U. S. 271.

Did Division Two of the Supreme Court of Missouri, by misquoting the transcript and condoning perjury in the opinion signed per curiam, violate Amendments IV, V, VI, and XIV, Section 1 of the United States Constitution? This question is substantial.

A. On page 3 of the opinion is found the following: "Defendant's motion sought to suppress evidence relating to the cartridge cases, bullets, and pistol found in and taken from his home. **He cites U. S. Constitution Articles IV and V of Amendments; Constitution of Missouri, Article 1, Sections 15 and 19; Mapp v. Ohio, 81 Sup. Ct. 1684.**

The record before us preserves no evidence or proof offered in support of said motion and there is nothing upon

which to predicate prejudicial error as the allegations in said motion do not prove themselves."

On pages 4 and 5 of the opinion: "DEFENDANT IN HIS BRIEF ALLEGES THE COURT ERRED IN OVER RULING HIS MOTION TO PRODUCE A SIGNED WRITTEN STATEMENT MADE ON MAY 25, 1959 BY WITNESS HARVEY BEAVERS, BUT THERE IS NO EVIDENCE **or proof offered in connection with said motion in this record and hence nothing to predicate prejudicial error."**

The Trial Court's record found on page 23 disproves the above statements in the following: "And thereafter on the same day, April 26, 1960, Motions to quash information, to produce, and to suppress are presented to the Court, and the Court, **having considered the evidence** and being fully advised in the premises overrules motions of defendant as follows: **Motion to suppress evidence**, Motion to quash information and **Motion to produce."**

And on page 236 of the transcript: "Mr. Cleek: Your Honor, while they are doing that I would like to ask a few preliminary questions as to the admissibility of some of the things.

The Court: Are you raising the questions as heretofore raised preliminary to trial?

Mr. Cleek: Yes.

The Court: Hasn't that been adjudged?

Mr. Cleek: I believe that it should be raised again.

The Court: I think not. **You have got the question squarely lodged in the case and it is not a matter for the jury to decide. It is for me to decide."**

The Attorney General of Missouri in his brief filed in 48,488 and on page 5 is found the following: "The defendant on April 26, 1960 (R. 19-22) filed a motion to suppress evidence. This motion was substantially the same

motion filed in the Magistrate Court (R. 18) **and alleged in substance that defendant had been unlawfully arrested by officers Duncan and Lukehart,** and that other officers had unlawfully seized certain personal property, consisting of a .32 caliber pistol, five cartridge casings, and 3 spent missiles (R. 20). The motion went on to allege that the evidence described had been seized as a result of unlawful search and seizure in violation of State and Federal Constitutions (R. 21). This motion was again denied (R. 23)."

On page 6 of said brief is found: **"On April 26, 1960, the defendant renewed his motion to produce (R. 22-23) requesting that the State be required to produce any signed statements of witness Beavers which it had in its possession. This motion also was denied"** (R. 23).

The Court also had the Transcripts filed in State v. Brookshire 48,488, and Contestible v. Brookshire 48,581, which showed the testimony of Deputy Sheriff Duncan touching this motion (Tr. pp. 139-147 and 151-153), and Deputy Sheriff Lukehart (Tr. pp. 173-177), and Coroner Vincent Perna (Tr. pp. 366-369 and 425-427), all in Case 48,488 and in Case 48,581 testimony touching this matter. Lukehart pages 34, 35, 37, 156 and 158; Coroner Perna pages 97-400; and Deputy Sheriff Duncan pages 216-218.

All of this testimony showed that no warrant was used for appellant's arrest and no search warrant was used for the search of appellant's home, including the upstairs, which was not in sight of the body of the deceased. All of the trial Court's records and the testimony definitely disprove the statements contained in the opinion.

B. "On the way to the farm from St. Louis, where Beavers was hired, Defendant told him Collings was 'so weak he can't harness the horse.'" Opinion page 6. An examination of the testimony of the witness Beavers will disclose that he never testified that he was hired in St. Louis by the defendants (Tr. pp. 304-366).

"Q. (By Mr. Woods) I will ask you this question. Did Mr. Brookshire make any statements to you about Mr. Collings when he first hired you?

A. Well, I presume he was talking about Mr. Collings. He was the only man there.

Mr. Cleek: I ask it be stricken out.

The Court: It is stricken.

Q. Did he say anything about the hired hand he had at his farm?

A. Well, a time or two he said he was an old reprobate and he said, 'Don't let me forget to get him some wine.' He says, 'He is so weak he can't harness the horse.'

Mr. Cleek: YOU DIDN'T KNOW WHO HE WAS TALKING ABOUT?

The Witness: NO SIR, I DIDN'T KNOW.

Q. (By Mr. Woods) At any time. Did you know later who he was talking about?

A. HE NEVER TOLD ME ABOUT HOW WEAK HE WAS". (Tr. pp. 341-342).

C. "Furthermore, defendant voluntarily testified at the trial that he got 'this gun' and shot Collings." Opinion page 3.

A careful examination of the testimony of the appellant will disclose that he never at any time used the expression "this gun" (Tr. pp. 439-484).

D. "The difference between his and the State's position is that he contends the homicide was justifiable and **the State contends it was Manslaughter. In view of defendant's admissions he may not now successfully urge prejudicial error.**" Opinion page 3.

The Information filed charged First Degree Murder (Tr. p. 2). The instructions of the trial Court (Tr. pp. 521-534) were for murder in the second degree, manslaughter, and justifiable homicide (Tr. pp. 531-532). The State at

no time contended it was Manslaughter. Let us examine the State's contention.

"**Gentlemen, a man who does something like this is a menace to our community and we want to get rid of him. Now the maximum punishment in this case is life imprisonment. And second degree murder is ten years to life, and the State feels that this man has been found guilty of second degree murder and that the elements are premeditation**" (Tr. p. 580). And on Tr. p. 581: "I say gentlemen, that the facts in this case are conclusive. **It does show a heart bent on fatal mischief**" (Tr. p. 581). These are contained in the argument of the prosecuting attorney to the jury. At the close of the argument the Court addressed the jury, saying: "Now gentlemen, there are three possible verdicts which you can render in this case, as you have heard, **one for murder in the second degree**, one for manslaughter, and one not guilty" (Tr. p. 581).

The statement contained in the opinion was untrue.

"There was no showing of any improper action excluding Negroes from the panel if defendant of the white race may raise the issue." Opinion page 5.

"Mr. Cleek: **Will you admit, so I won't have to put any testimony on, will you admit there are no Negroes on the jury panel?**

Mr. Woods: **Yes.**

Mr. Cleek: **Will you admit none have been subpoenaed on this panel?**

Mr. Woods: **I think that is true, I will admit that**" (Tr. p. 123).

Assignment 7 of motion to quash panel is "**That said jury panel is void of a representative number of panel members from the Negro race**" (Tr. p. 123).

"The back porch is south of the kitchen." Opinion page 6.

No evidence sustains this statement. The testimony shows definitely that the porch is directly east of the kitchen (Tr. 185 and 148).

"Collings was described as 5 feet, 4 inches tall, weighing about 135 pounds, a pretty spry old man, smaller than defendant." Opinion page 6.

A search of the record will disclose that no one testified to the height, weight, or physiognomy of the defendant.

"Saturday, May 23, after arguing, defendant and Collings went to St. Louis returning about midnight."

This statement is untruthful and not supported by the testimony.

Q. (By Mr. Woods) Mr. Beavers, on Saturady morning early did Mr. Brookshire and Mr. Collings leave the farm home?

A. Yes, sir.

Q. At that time where were you when they left?

A. **I was in my room.**

Q. Well did you see them get in the car and leave?

A. Yes, sir.

Q. **Is there a window on the north side of your room you can look out of?**

A. **I wouldn't say.**

Q. Were there any arguments between the two?

A. **Yes, sir, they were arguing about something. I don't know what it was. I couldn't understand what they said.**

Q. How long were they gone that day?

A. They were gone all day until way up in the night must have been midnight.

Q. Had you already gone to bed?

A. Yes, sir.

Q. Did Mr. Collings come to your room that evening?

A. Yes, sir, he did (Tr. p. 348).

On Cross-Examination:

Q. Now I believe you testified that on the next day it would be Saturday, that Ralph Collings and Mr. Brookshire got in the car and made a trip some place.

A. **They did. I don't know where they went though** (Tr. p. 352).

Q. **Did he make any comment to you about the defendant trying to get him to go to his home OR to St. Louis** or buy him a bus ticket?

A. Not that night, he never, no.

Q. Did he make the comment to you the next day?

A. He did, the next day" (Tr. p. 353).

The appellant testified in Case No. 48,581.

"Q. Did Ralph Collings ever make any trips with you while he was working for you, away from your farm?

A. On the night of May 22nd—I had—he wasn't a valuable hand and I was going to St. Louis on May 22nd and I wanted him to go along and stop off at his daughter's. He told me he didn't want to go, but when I came home that night with these two men he said that he had decided to go to his daughter's, and I was going to Clinton, Missouri, the next day and he wanted to know if he could ride as far as Jefferson City.

Q. That was on May 23rd?

A. That would be the early morning of May 23rd."

The writer of the opinion knew Clinton, Missouri, was in the opposite direction of St. Louis from the appellant's farm.

"Beavers then working about thirty feet away. . . ." Opinion page 7.

"Q. **What did you do when you heard the shots?**

A. **(By Beavers) I worked on.**

Q. Mr. Hayman was with you?

A. Yes, sir.

Q. How long did you work there?

A. I would say ten minutes.

Q. Before anything happened, where were you working?

A. Down at the barn.

Q. About how far from the house was that?

A. **Well, I would say a hundred feet**" (Tr. pp. 326-327).

"Defendant removed his shirt and had them look where he said Collings had struck him with the hammer on the back of his right shoulder. Beavers could see nothing wrong with defendant's shoulder." Opinion page 8.

Testimony upon which this statement was made is as follows:

"Q. What did he say to you when you went in there?

A. Well we walked in the other room.

Q. What other room?

A. They call it a dining room; I call it a living room.

Q. Is this room just off the kitchen to the north?

A. To the right. I don't know whether it is right or not. We were in there and he pulled his shirt off. 'Look here where he hit me.'

Q. **You have your left hand over behind your right shoulder?**

A. **I was standing on his right side.**

The Court: **Did you then have your left hand over your right shoulder?**

The Witness: **That's right.**

Q. Now let's go back a little. Now when he took his shirt off and you looked at his shoulder, was there anything you could see wrong with his shoulder?

A. **No, sir. You take a fat person, you can't tell nothing about them.**

Q. Was there any blood?

A. No, sir.

Q. Were there any bruises?

A. I couldn't tell if there was" (Tr. pp. 334-336).

On cross-examination the appellant testified.

"Q. Was that a heavy blow on your shoulder?

A. No, it wasn't a heavy blow or I wouldn't have been here to tell the story.

Q. It wasn't? It was a light blow?

A. It was a glancing blow. THERE IS AN INJURY THERE NOW" (Tr. pp. 459-460).

"Dr. R. J. Miller examined defendant who complained of pain in the right shoulder and left wrist on May 26. He found no evidence of any injury or bruise on defendant's shoulder, **but defendant had superficial scratches of a circular nature on the back of his left wrist. Deputy Sheriff Lukehart** TESTIFIED HE PUT HANDCUFFS ON DEFENDANT WHEN HE TOOK HIM TO COLUMBIA AND WHEN HE REMOVED THEM THERE WAS A RED MARK ON THE BACK OF DEFENDANT'S LEFT WRIST." Opinion, page 8.

This statement is untruthful and was known to be false by the writer of the opinion. The testimony touching this statement is as follows:

Dr. R. J. Miller, Tr. pp. 432-435. Case No. 48,488.

"Q. (By Mr. Woods) Dr. Miller, did you have occasion to examine the defendant, W. A. Brookshire at the Boone County jail May 26, 1950?

A. Yes, I did.

Q. About what time of day did you examine him?

A. As I recall it was around 5:30 in the evening.

Q. Was that on the day following this shooting or the same day?

A. Following day.

Q. Did he complain of any specific injuries?

A. Yes.

Q. Where?

A. He complained of pain in the right shoulder and also in the left wrist.

Q. Did you examine his right shoulder?

A. Yes.

Q. Were there any marks, unusual marks of any kind?

A. Not on the shoulder.

Q. Were there any unusual marks anywhere that you examined?

A. On his wrist.

Q. What kind of mark was on his wrist?

A. He had some superficial abrasions or scratches on the back of his wrist and some—it was bruised and also a moderate amount of swelling.

The Court: Also what?

The Witness: **Moderate amount of swelling.**

Q. (By Mr. Woods) Where were the abrasions and what was their shape?

A. They were on the—well, extensor surface or the back of the wrist, **this area approximately where my watch is,** in that area.

Q. Did they go all the way around his wrist?

A. No, not entirely circle the wrist.

Q. Did you see a small red spot, a spot on his left wrist?

A. No answer.

Q. That seemed to be separate from the abrasion itself?

A. No, he had a bruise a little further up on the forearm, but I didn't see anything except the abrasion and swelling and slight bruising of the same area.

Q. You found nothing wrong with his shoulder?

A. No.

Mr. Woods: That is all.

Mr. Cleek: That is all, doctor.

The Court: That is all, sir.

The same witness testified in the case of Contestilde v. Brookshire, No. 48,581 at Mexico, Missouri, July 27, 1960 (Tr. pp. 66-81), and was cross-examined by the appellant.

"Q. Doctor, did you make a report?

A. Pardon?

Q. I say, did you make a report of your examination?

A. TO THE PROSECUTOR.

Q. Did you make a report, a written report of your examination?

A. I believe that I did, yes.

Q. Where is it? Do you have it with you?

A. I have a copy.

Mr. Brookshire: Let's see it.

Witness hands paper to Counsel.

Mr. Brookshire: Read that.

The Witness: Did you mean for me to read it out loud?

Mr. Brookshire: Read that out loud.

Q. (By Mr. Brookshire) **I didn't call you up for an examination, did I, doctor?**

A. No.

Q. I didn't object to it, did I?

A. No.

Q. You state in this report that you found bruises and superficial abrasions, **there was a small bruise 3 centimeters in diameter on the middle of the left forearm. What is a centimeter?**

A. Three centimeters would be a little over an inch.

Q. Well, then there was a bruise. Just show the jury on my hand where that bruise was.

A. That bruise was found up the arm?

Q. There was a bruise right here, wasn't there?

A. There was some bruises there, yes.

Q. There was some discoloration, wasn't there, doctor?

A. Yes.

Q. I told you that a glancing blow from a hammer hit me, didn't I?

A. As I recall, I believe you did.

Q. I told you there was a glancing blow on the shoulder, didn't I?

A. I think so.

Q. Your examination was superficial, wasn't it?

A. Well, I examined it as thoroughly as I could under the circumstances.

Q. When you raised my arm, I complained of a soreness, didn't I, doctor?

A. Yes.

Q. I complained of pain, didn't I?

A. Yes.

Q. And I willingly submitted to your examination?

A. Yes.

Q. How many places did you find on my left arm that was bruised?

A. There was one large bruise up there and I would say two or three smaller bruises or abrasions on the back.

Q. And you attempted to raise my shoulder and found out that I complained of pain, didn't I?

A. Yes. You complained of pain.

Q. Why did you conceal that written report when you were testifying on direct examination?

A. I didn't conceal it.

Q. (By Mr. Brookshire) **Doctor, when did you prepare this report?**

A. It was very shortly after I examined you.

Q. Why didn't you produce it?

A. I wasn't asked for it.

Q. Did you prepare it that day, doctor?

A. I don't recall, really. That was prepared from some notes that I made at the time of the examination.

Q. Well, this examination was not made at my request was it?

A. No. I didn't talk to you directly as I recall. **I think the prosecutor's office called and asked me to examine you.**

Q. And that was done in the jail cell?

A. Yes.

Q. You have here, "Mr. Brookshire complained of pain

and discomfort in the right shoulder on movement", is that correct?

A. Yes.

Q. "On examination of the right shoulder there were no external signs of trauma." Well, if my clothes had been on there wouldn't have been any sign of trauma, would there?

A. I think it would depend on the way that the blow was struck and the construction of the coat if it hit right over the pad on the shoulder it would take a pretty hard blow to cause signs, visible signs of trauma.

Q. A blow that hard from a hammer weighing 5 pounds would have broken the arm, wouldn't it?

A. It certainly could have, yes, a direct blow.

Q. I told you it was a glancing blow, didn't I?

A. I think so.

Q. Just what are you trying to tell this jury that that bruise might have been caused by the handcuffs?

A. I was referring the bruises and abrasions around the wrist. I was not referring to that one further up on the arm.

Q. On this written report you say nothing about any handcuffs do you?

A. No, sir.

Q. Well you didn't have any evidence that I was feigning, did you?

A. I had no reason to assume you were."

This disproves the statement of the opinion signed Per Curiam.

Testimony of Harvey Beavers about what he saw within a few minutes after the shots were fired.

"Q. Did you go in the kitchen?

A. Not until Hayman got there. I said, "Come on Hayman." I walked in and he pointed down at the body.

Q. Who pointed down?

A. Mr. Brookshire. He says, "There he is." And I said, "Damned if it ain't."

Q. And —

The Court: Alright, let's have order, please.

Q. Did you ask him what had happened in there? Did you inquire what had happened?

A. I did not. HE SHOWED ME HIS WRIST.

Q. What did he say about his wrist?

A. He said he tried to hit him with a hammer or hit him with a hammer.

Q. And showed you his wrist?

A. Yes.

Q. Was there anything?

A. A red spot."

Q. How big was it?

A. About as big as a dime I guess. (Tr. 48,488, 328-329).

This red spot was seen before any handcuffs were placed on appellant's arms. This shows the untruthfulness of the opinion.

The part of the statement attributed to Deputy Sheriff Lukehart:

"Q. Mr. Lukehart, between the time that you called Dr. Leroy Miller and the time that you took him into custody did he any time try to show you any bruises or abrasions on or about his person?

A. **I believe once at the jail that he stated that he had a little red spot on his wrist there, and I believe at that time that he stated that the man hit him with a hammer, at that time"** (Tr. 48,581, p. 41).

L. "Collings, after complying with defendant's request to show Beavers and Hayman what to do at the barn was entitled to return to obtain his suitcases **which were in defendant's house."** Opinion page 14. This statement is untruthful. Not a single word of testimony justifies the

statement "which were in defendant's house." Harvey Beavers testified as follows:

"Q. (By Mr. Woods) Now this room that you went into, the dining room, did you see Mr. Collings' suitcases there?

A. I did, sir.

Q. Where were they located?

A. About six foot from the door.

Q. From what door?

A. From the front door.

Q. **Did you ask Mr. Brookshire about those suitcases?**

A. **I did. I asked him how come the suitcases are here and he said, 'I brought them in here'** (Tr. pp. 335-336).

Q. **Did you ask Mr. Brookshire why he moved the suitcases in the dining room?**

A. **No, sir. I did not.**

Q. Now where were the suitcases the last time you saw them before you saw them in the dining room?

A. One at the foot of my bed and the foot of Mr. Hayman's bed.

Q. In the place where you were staying?

A. That's right" (Tr. p. 338).

"Q. Was Mr. Collings talking to anyone?

A. I don't know. He was bound to be talking to someone. He was looking up to the window.

Q. You don't know a thing?

A. **Until he wheeled and turned. I didn't understand it until he wheeled and turned and said, 'If I don't get my money, there is going to be one dead son-of-a-bitch'"** (Tr. pp. 323-324).

"Q. (By Mr. Woods) Mr. Lukehart, when you first entered the Brookshire home, and prior to the time that he was taken to jail did you see any suitcases in the dining room? Of the Brookshire Home?

A. Yes, I did.

Q. **And what was done with those suitcases?**

A. **I took them to the Boone County Sheriff's office.**

Q. And were there any identification or markings on those suitcases?

A. Yes. There was a strip of white adhesive tape on the top of each suitcase with the name B. B. Collings written in ink on each strip of adhesive tape" (Tr. pp. 192-193).

"Q. Did you ever notice any suitcases in the dining room of the house?

A. Yes, sir.

Q. When?

A. **After the jury and all the people had gathered in the house.**"

The above from testimony of Deputy Sheriff Duncan (Tr. pp. 147-148).

No witness testified when the suitcases were brought into the dining room. **It will be noted that the suitcases were seized illegally after the appellant was illegally arrested and removed and never were offered. It will be noted that the deceased did not yell out, "If I don't get my suitcases there is going to be one dead son-of-a-bitch." Instead he said "If I don't get my money there is going to be one dead son-of-a-bitch."** If the truth had been obtained it would have been conclusively revealed that the suitcases were not in the dining room when Collings was killed. The statement of the writer of the opinion is an untruthful and prejudicial statement.

"Either of the fatal wounds would have caused instant unconsciousness causing Collings to fall." Opinion page 9.

This statement is based entirely upon perjury committed by Dr. Vincent Perna, the coroner. He testified as follows:

"Q. Assuming this man was standing erect at the time the wounds in the side and in the breast were inflicted, what would his body have done after those wounds were inflicted? Where would they have gone?

The Witness: **He would have been rendered instantly unconscious and died within minutes.**

Q. (By Mr. Woods) **Would he have been able to stand erect?**

A. **No, sir.**

Q. **He would have fallen?**

A. **He would have fallen"** (Tr. pp. 388-389).

This same witness testified in the case of Contestible v. Brookshire, case No. 48,581. This case was tried after the criminal case No. 48,488 was tried.

"Q. Do you have an opinion as to whether or not ANY of the wounds **would have stopped the forward advance of a man?**

A. **I don't think that—I would have nothing to base that upon, no** (Tr. p. 95).

Q. **You don't know how long he lived after he was shot, do you?**

A. **I can state—I don't know to the very exact second or minute, no.**

Q. **And you don't know how many steps that he took, do you?**

A. **No, I don't.**

Q. **You don't have the faintest idea, do you?**

A. **Well, I have got a fairly good idea.**

Q. **Well, your deposition was taken on the 24th day of March at Columbia, wasn't it?**

A. I don't recall when that was taken.

Q. And on page 32 of that deposition I asked you this question and you made this answer: 'Question: How many steps did he take after he was shot? Answer: **I don't have the faintest idea.' That was your answer?**

A. **Yes, it was"** (Tr. pp. 105-106).

"The first time Beavers entered the kitchen Collings' hat was about twelve inches from his head, but it was on his head the second time Beavers was in the kitchen" (Opinion, page 8).

Assignment 16 of appellant's motion for a new trial contains the following: "The defendant did not receive a fair and impartial trial for the reason that the prosecuting attorney, **Larry Woods, bribed and connived with Harvey Beavers so that in the trial of the case said witness, among other testimony, testified as follows:**

Q. (By Mr. Woods) Now when you first went into the kitchen after he called you in right after the shots were fired.

A. Yes, sir.

Q. At that time?

A. It was about—he called me up there.

Q. I understand, but wait. When you first went into the kitchen after the shots were fired, you and Mr. Hayman, did you look at the body closely?

A. Yes, sir, I did.

Q. When you looked at the body was the hat on his head?

A. It was not the first time, no, sir.

Q. Where was the hat the first time?

A. **I'd say twelve inches from the head.**

Q. Was it toward the kitchen sink or toward the feet?

A. The sink is over here (indicating) and his hat about twelve inches from the right.

The Court: **Twelve inches from the right of his head?**

The Witness: Yes, sir.

The said prosecuting attorney had by persuasion and by purchase secured this testimony which is in direct conflict with the testimony given by the same witness at the Coroner's inquest and is untrue; that the defendant has positive information that the said prosecuting attorney furnished money to said witness on one occasion by telegraphing money to the witness for the purpose of changing the testimony to make it appear that the hat belonging to the deceased was taken from the floor of the defendant's residence and placed on the deceased's head."

The defendant, since the trial of this case, has submitted to a lie detector, which is mentioned in another assignment in this motion and which shows positively that no part of the scene of the killing was changed after the killing occurred (Tr. pp. 601-603).

A copy of assignment 16 is marked Exhibit E.

On August 25, 1960, defendant's motion for a new trial was heard. **Larry Woods, the above-named prosecutor, was called as a witness and appears in the transcript, pages 610-619.**

On pages 614-615:

Q. I am reading now testimony you took in my absence at the coroner's inquest: "**Question: Exhibit D shows Mr. Collings' body. There is what appears to be a hammer or mallet. Did you look down to the floor when he said, 'There he is?' Answer: I did. Question: Now look at that picture. Does that picture look like what you saw when you looked down at the floor? Answer: It does. Question: That only shows part of it, I know. Answer: That is the way he looked when I saw him. Question: Did you see that mallet laying there? Answer: Yes, sir. Question: Mr. Collings' hat is on there. Answer: That is the same way he was laying the last time I saw him. Question: His head was up against the leg of the chair? Answer: Yes. Question: There doesn't seem to be anything different from what you saw there? Answer: No.**" You knew that testimony was given at the coroner's inquest by Harvey Beavers?

A. I don't know until I look at that.

Q. Look at what?

A. **That's right.**

Q. Mr. Beavers called me and I met him in St. Louis and I asked him about that and he said that wasn't true—**that the hat was off his head.**

A. I don't know about that. I wasn't there.

Q. **What is your purpose in trying to show that I had removed his hat?**

A. I object to the question. It's irrelevant what my purpose was in offering evidence.

The Court: **Which allegation of your motion are you undertaking to support now?**

Mr. Brookshire: Let's see. Allegation 15.

The Court: What does it say?

Mr. Brookshire: No. 16. The defendant did not receive a fair and impartial trial for the reason that the prosecuting attorney, Larry Woods, bribed and connived with Harvey Beavers so that in the trial of the case said witness, among other things, testified as follows (Tr. p. 616):

Q. **You knew that Beavers was doped up before he testified, didn't you?**

A. **I didn't know it.**

Q. What did you send him to a doctor, here in Jefferson City, for?

A. I did not send him to a doctor in Jefferson City.

Q. **You are testifying under oath that you didn't send him to a doctor down on High Street?**

A. **I did not.**

Q. **What doctor did you send him to in Columbia?**

A. **I didn't send him to any doctor, but I called the county health physician to give him some kind of medication.**

Q. Well, you knew it?

A. But that physician was in Columbia, not in Jefferson City.

Q. (By Mr. Brookshire) **You know there appeared in the Columbia Missourian, Tuesday, May 3rd, 1960, "Too Many Tranquilizers"?**

Mr. Woods: I object to the question (Tr. pp. 618-619).

The importance of this perjury is noted as follows:

"Mr. Woods: **Your Honor, this picture also shows the way the hat is jammed down on the head of the deceased and that is very relevant in our case"** (Tr. p. 196).

Mr. Woods, in his argument to the jury, said: "**The hat, Mr. Collings had a hat on when the officer from Boone County got there. It was jammed down on his head. You saw the picture of it. It looks like it's going to push the top of his ears down on his chin. Harvey Beavers said when he was called into the Brookshire residence he said the hat wasn't on his head. It was laying off to the right. How far! Twelve inches. There is only one person that could have touched that hat and he is sitting there. The next question. Why I don't know but he did it. Out of malice maybe. Can you see him shoving it on his head? 'Now I got rid of you.' Because there is plenty of evidence he was trying to get rid of him**" (Tr. pp. 545-546).

The defendant testified (Tr. pp. 439-484):

"Q. Would you say the body was moved before that picture was taken?

A. I don't know. **I don't know what was done after they took me away. I know it wasn't touched before.**

Q. It wasn't touched before?

A. No, it wasn't.

Q. Did his hat fall off when he hit the floor?

A. It did not.

Q. It was still on his head?

A. **I never touched his hat. I never touched anything about it** (Tr. pp. 476-477).

The record reveals this perjury was clearly shown (Tr. pp. 601-619). **It is clear from this record that the Supreme Court not only affirmed the conviction with the above perjury clearly presented to it, but in each of the above pleaded misquotations, untruthfully stated the testimony and the record.**

This Court has many times condemned perjury and held that due process was violated by such perjury.

This Court, in Henry Napue, Petitioner, v. People of the State of Illinois, in a very able opinion by Chief Justice

Warren, approved an opinion rendered by a New York Court of Appeals which contained the following:

"It is of no consequence that the falsehood bore upon the witness's credibility, rather than directly upon defendant's guilt. A lie is a lie no matter what its subject."

This principle should be applied to the misquotations of the writer of the opinion complained of in this case.

The appellant on January 23, 1962, filed a motion for a rehearing or in the alternative to transfer to the Court En Banc in each division of the Court. And on February 8, 1962, he filed in each case suggestions in support of each of his motions. On February 12, 1962, Division 2 in Case 48,488 overruled the motion and made the following order: **"It is further ordered that the other paper writing filed contemporaneously therewith on January 23, 1962, purporting to be and which is entitled** "Motion for a rehearing or in the alternative to transfer to the Court En Banc" and also appellant's suggestions in support of motion for rehearing or in the alternative to transfer to the Court En Banc filed on February 8, 1962, **be and the same are stricken from the file for the reason that they are scandalous, impertinent and scurrilous." That the appellant filed with said Court a Motion to Produce Evidence, that a copy of said motion is Exhibit F.**

That on February 12, 1962, Division 1 made the following order in Case 48,581: "Suggestions in support of appellant's motion for a rehearing or in the alternative to transfer to the Court En Banc filed by W. A. Brookshire stricken as scandalous and scurrilous."

That the appellant filed with said Court a Motion to Produce which is Exhibit G. That neither division ruled on the said Motion to Produce.

That the misquotations and perjury committed have been ruled by this Court in:

Henry Napue, Petitioner, vs. People of the State of Illinois	June 15, 1959.
Alvara Alcorta, Petitioner, vs. The State of Texas	November 12, 1957.

Did the Court, by ruling that the appellant by failing to kill the deceased when he broke into appellant's home, was limited to an instruction on self defense of his person and was not entitled to an instruction that used the following language:

"The Court instructs the jury that in the eye of the law a man's home or dwelling is considered his castle **and when assaulted in his dwelling he is not obliged to retreat but may stand his ground, defend his possession and use such force or means as are absolutely** necessary to repel the assailant from the house even to the taking of life." Violate Amendments V, VI, and XIV, Section 1 of the United States Constitution and the old established common-law rule that a man's home is considered his castle. This question is substantial. Morgan v. Durfee, 69 Mo. 469; 40 C. J. S. 974.

Did the Court, by ruling that the trial court did not abuse its discretion by adinitting the testimony of personal enemies of the appellant for the purpose of impeachment, violate Amendments VI, and XIV, Section 1 of the United States Constitution? This is substantial. One witness who admitted he had been sued by the appellant.

"Q. What is that reputation?
A. Terrible (Tr. pp. 504-508).

Scott Wright testifying."

Another witness, Robert Renn.

Q. You had a difficulty over a fence line and you came here to testify, is that right?

A. Yes, sir (Tr. p. 501).

The importance of this testimony is shown by the argument made by the prosecuting attorney, Larry Woods, to the jury.

"Now if you don't believe those people, what they say, then the State doesn't have much of a chance." He was referring to reputation witnesses (Tr. p. 573).

This shows how the conviction occurred and why the misstatements of the writer of the opinion violated the right of the appellant to due process. 26 Am. Jur. 388; 20 Am. Jur. 304; 33 Am. L. R. 1219.

Did the trial court and the Supreme Court of Missouri, Division One, violate Amendments V and XIV, Section 1 of the United States Constitution, by ruling that the respondent was not bound by the appellant's testimony given as respondent's witness and is this particularly so under the facts and circumstances of the case at bar? This question is substantial.

This case 48,581 was tried July 27-29, 1960, at Mexico, Missouri. The plaintiff placed in evidence the following witnesses:

1. Deputy Sheriff Pearlie Lukehart (Tr. pp. 33-64 and 129-197).

2. Theron Duncan (Tr. pp. 198-228).

3. James Runkle (Tr. pp. 228-244).

4. Lt. James Rhodes (Tr. pp. 245-262).

5. Plaintiff Dorothy C. Contestible (Tr. pp. 263-295).

6. **The appellant was then called as plaintiff's witness** and from page 298 to page 330 the appellant as plaintiff's witness testified to his education (Tr. pp. 298-299). Pages 300-330 as to his property, financial standing and residence. Pages 330-349, cross-examination by his attorney Paul Allen.

"Q. (By Mr. Allen) When did Collings start working for you on your farm, Mr. Brookshire?

A. He came to my farm the 21st day of April, 1959 (Tr. p. 331).

Q. After Ralph Collings came home with you on April 21st and started working on your farm, what kind of work did he do for you?

A. **He did some painting on a garage and some painting on my residence.**

Q. Did he look after the cattle on your farm?

A. He did for a few days, **and let one perish for water.**

Q. What was the agreement, if any between you and Ralph Collings in regard to how much you would pay him?

A. **Well, as long as he was doing chores on the farm he was to work for room and board and when he started painting he was to be paid whatever the services were worth.**

Q. **Did you pay him for all the services rendered?**

A. **I did.**

Q. While Ralph Collings was working for you on your farm, Mr. Brookshire, what was your relationship? Was it pleasant or did you have arguments?

A. No, we had no arguments. **The relationship was very pleasant.**

Q. Did Ralph Collings ever make any trips with you while he was working for you away from your farm?

A. On the night of May 22nd—I had—he wasn't a valuable hand and I was going to St. Louis on May 22nd and I wanted him to go along and stop off at his daughter's. He told me he didn't want to go but when I came home

that night with these two men he said that he had decided to go to his daughter's **and I was going to Clinton, Missouri the next day and he wanted to know if he could ride as far as Jefferson City.**

Q. That was on May 23rd?

A. That would be the early morning of May the 23rd (Tr. p. 334).

Q. (By Mr. Allen) Go ahead and tell what happened, if anything, on the morning of the 25th of May?

A. **Well on the 25th I was going to the state of Iowa. I got up reasonably early and dressed.** I got breakfast for the men and **Collings didn't come in and eat. He was dressed. He had his bags packed. I—he went—he stayed back in the room where the men lived. I went back and told him I expected him to leave and he said, "Well, I will leave when you pay me what you owe me." And I said, "I don't owe you anything." He had taken a twenty dollar bill that I had given him and had given that to a woman who had come to my farm to get pay for some hay, and he mentioned a time or two that I should give him that twenty dollars back** (Tr. pp. 330-336).

Q. (By Mr. Allen) Was Mr. Ralph Collings present when you had breakfast?

A. No, he wasn't. **He didn't come in to eat.**

Q. After breakfast when did you first see Ralph Collings, Mr. Brookshire?

A. Well, I started to go to my car. I was going to Iowa. I had told him I wanted him to go along as far as Columbia. As I went out of the north door, **I saw him coming around on the north side of the house with this hammer.**

Q. That was on the morning of May 25th?

A. That's right. **I—it surprised me that he had the hammer in his hand.** I thought he might be going to smash my car. I didn't know what he was going to do with it.

Q. (By Mr. Allen) What did you do next?

A. I went back into the house into the dining room and the kitchen.

Q. Where did Ralph Collings go?

A. He went around on the east side of the house that adjoins the main house.

Q. Where did Ralph Collings go?

A. He came on around the east side of the house and south side of the house to a door that comes up on the porch that adjoins the main house.

Q. What did Ralph Collings do next, Mr. Brookshire?

A. As he stepped up on the porch, he had the hammer in his hand **and I saw he was very angry.**

Q. (Interrupting) Where were you at this time?

A. I was standing by the kitchen door and he said, **"I'm coming in to kill you, you son-of-a-bitch." I told him to stop and he didn't stop.**

Q. Where was he at the time that you told him to stop?

A. He was—it was about eighteen feet from the kitchen door to the other door. **He had just stepped up on the porch.**

Q. Where were you at that time?

A. I inside of my kitchen at the kitchen door.

Q. All right. Then what did you do next, Mr. Brookshire?

A. Well, I told him to stop. He kept coming. **He took the hammer and hit the screen door and the top part of the kitchen door** was glass. Almost half of it was solid glass. **He struck that glass and broke it out, jarred the door open and came on into the house.**

Q. Where were you at that time?

A. I was inside of the kitchen.

Q. At that time did you make any statements to Ralph Collings?

A. I kept telling him to stop.

Q. Did he stop?

A. **Oh, no! He began swinging at me and pursuing me**

and I retreated into the dining room of my home. He got so close on to me that with a glancing blow.

Q. (Interrupting) Mr. Brookshire, did he have this hammer in any of his hands?

A. He had the hammer in his right hand **and was striking at me.**

Q. Did you have a gun?

A. I did.

Q. Was it on your person or where was it located?

A. **It was in my hand, in my right hand.**

Q. Where do you keep that gun in your home? Where did you keep it there?

A. Well, when I am at home I keep it at the head of my bed in a little stand in my bedroom upstairs, **but when I was going on a trip the house would be left vacant** AND I ALWAYS TOOK THE GUN AND **put it in a BOX ON THE DINING ROOM TABLE IN THE DINING ROOM OF the house and in the box I always placed the revolver when I was gone to have it when I returned home. I had placed that gun there because I was going to the state of Iowa.**

Q. When had you gotten that gun out of the box?

A. Well, I got the gun when he made the threats.

Q. After you told him to stop, did he stop?

A. He did not stop.

Q. Well, what happened next?

A. Well, the gun was on safety and I kept backing until I got to the dining room. **He got so close to me that I thought I was going to have to give up.** I got the safety off of the revolver and fired.

Q. Now where was he at the time that you fired?

A. Oh, he was right on top of me because the bullet evidently struck his arm. I thought I had missed him entirely the first shot. **He came swinging and a glancing blow struck my right shoulder. I fired again and he kept swinging and coming towards me. I fired I thought a couple of shots.**

Q. Did he grab hold of you?

A. Oh no, he had the hammer in his hand. He was striking at me.

Q. With his right hand?

A. With his right hand.

Q. When you fired the last shot how close was he to you, Mr. Brookshire?

A. Oh, I don't know. He was close within, oh, I don't know, within a few feet of me. He was pursuing me and I fired and the last shot that I fired I realized it had taken effect. That was the first time I realized the shot had taken effect. I stopped firing.

Q. After you stopped firing, did he advance towards you?

A. No, he stopped. He held the hammer up in his right hand. He brought his left hand up to his chest where he had been shot and let out a groan. He stood in that position, it seemed to me, for a couple or three minutes—it might not have been that long—and then took two steps and fell inside the kitchen and the hammer fell ahead of him.

Q. Which way did the body fall, face down?

A. Yes.

Q. Then what did you do?

A. I stood there for a minute or so. I went upstairs. I took the gun back to the bedroom.

Q. Was that the upstairs bedroom?

A. Yes. I called to the men who were working at the barn hauling manure. I called to them, brought them in and pointed out the man where he was laying.

Q. About what time was it, Mr. Brookshire?

A. Oh, I imagine it was around nine o'clock or shortly after nine o'clock when I left my farm. I drove to a public telephone and called the sheriff's office, and I drove back to the farm. The two men went with me.

Q. Then a few minutes after you got back to the farm,

did the sheriff's office, did a couple of deputy sheriffs come to your farm?

A. Yes, they came very shortly.

Q. Who were the deputy sheriffs?

A. Mr. Lukehart, Mr. Duncan and the coroner, Doctor Perna.

Q. Did you invite the deputy sheriffs and the coroner into your home?

A. Oh yes! That is what I called them for.

Q. Then what took place in your home after they arrived, Mr. Brookshire?

A. Well, they asked me, I believe it was Doctor Perna who asked me what happened and I said, "I want an immediate hearing and everything will come out." And one of them asked me where the gun was, and I said, "That gun will be produced at the proper time." And with that Lukehart said, "I am arresting you and taking you into the county jail."

Q. Did he put the handcuffs on you?

A. The two of them did.

Q. Who was the other one?

A. Mr. Duncan.

Q. And did Deputy Sheriff Lukehart take you to Columbia to jail?

A. Yes. He took me to the jail and locked me up.

Q. Did you make any statements to the Deputy Sheriff Lukehart on the way to Columbia?

A. There was no conversation between me and Lukehart until I got almost to the county jail and he asked me who the man was, and I told him I understood he had a daughter in St. Louis and he had a son in the insane asylum at Fulton. He had told me about that, **and I understood that he was divorced. And I told Deputy Lukehart that I didn't want any exploration of my home. Nothing moved without a search warrant. I told them before I left the farm.**

Q. Did you say anything to Deputy Lukehart concerning pain in your shoulder?

A. **Yes, I told him that my shoulder was hurting and he said nothing about it** (Tr. pp. 331-346).

The appellant then described his home (Tr. pp. 346-349); **there was no cross-examination of the appellant.**

Mr. Sapp: Your Honor, **there will be no further evidence on behalf of the plaintiffs** (Tr. pp. 349-350).

After this announcement, another attorney for plaintiff, Mr. Orr.

Mr. Orr: Your Honor, we also rest our case.

The plaintiff then undertook to call one of their witnesses, Theron Duncan.

Q. (By Mr. Sapp) Mr. Duncan, are you acquainted with William Albert Brookshire's reputation in his community for turbulance and violence?

Mr. Brookshire: If the Court please, we object. **I went on the stand as their witness. They have no right to impeach me.**

The Court: Let the record show that the objection of the defendant to the question put to the witness is sustained (Tr. p. 352).

Mr. Orr: Now then let's talk about the issue of the reputation of the defendant for truth and veracity.

The Court: All right. The question then arises, as the Court sees it; having put the defendant on the witness stand **and made him your witness**, the matter you elicited on direct examination. Having done that, and the defendant having on cross-examination brought forth further testimony—under such circumstances, are you entitled to impeach the credibility of the defendant in the case? That is the situation.

Off the record. (Discussion off the record.)

The Court: On the record. Now, are you ready to proceed, gentlemen?

Mr. Orr: Yes; we rest.

The Court: The plaintiff's case is closed (Tr. pp. 253-254).

At the close of plaintiff's evidence, defendant filed motion for a directed verdict (Tr. p. 254).

Motion overruled (Tr. p. 254).

The defendant offered no evidence.

Verdict and judgment for plaintiff (Tr. pp. 397-399).

Motions for new trial (Tr. pp. 400-413).

Appeal (Tr. p 413).

Opinion signed Per Curiam by Division One on page 2 contained this statement:

"The jury however had the right to disbelieve State v. Brookshire, Mo. Sup. S. W. 2d, handed down concurrently herewith, and evidently did disbelieve defendant's testimony in justification." Richeson v. Raghber, 159 S. W. 2d 658; Andrews v. Raghber, 270 S. W. 2d 329, l. c. 330. **98 C. J. S. 355-356** rules the issue favorable to appellant.

12. Did the Supreme Court of Missouri by making and entering its judgment March 6, 1962, disbarring the appellant without a hearing, with evidence, violate Article I, Section 10 of the Constitution of Missouri, and Amendments V, VI, and XIV, Section 1 of the United States Constitution?

A copy of the ruling made March 6, 1962, is in Appendix H.

Did the record justify the ruling of that Court that a crime had been committed involving mortal turpitude? This question is substantial.

Is Section 484.240, R. S. Mo. 1959 of the Statutes of Missouri in violation of Article 1, Section 10 of the Constitution of Missouri and Amendments V and XIV, Section 1 of the Constitution of the United States?

A copy of this section of the statute is in Appendix H.

A copy of the motion to set aside this judgment filed March 21, 1962, is contained in the transcript furnished by the Clerk of the Supreme Court of Missouri.

A copy of said motion is in Appendix H.

The following cases support this motion: State ex rel. v. McElhinney, 241 Mo. 592, 145 S. W. 1139; Speiser v. Randall, 78 S. Ct. 1332.

This motion was overruled April 9, 1962.

W. A. Brookshire.
Missouri State Penitentiary.
Pro se.

APPENDIX A

(Filed Jan. 8, 1962.)

In the Supreme Court of Missouri,
Division Number Two.

September Session, 1961.

State of Missouri,
Respondent,
vs.
No. 48,488.
W. A. Brookshire,
Appellant.

Appeal From the Circuit Court of Cole County.
Honorable Sam C. Blair, Judge.

Per Curiam:

W. A. Brookshire, charged with the offense of murder in the first degree, was convicted of manslaughter and sentenced to three years imprisonment for the killing of Ralph Collings, one of his farm hands, at defendant's farm home, about ten miles south of Columbia, Boone County, Missouri. He has appealed. The main contentions in his brief question the jurisdiction of the trial court, the overruling of certain motions on behalf of defendant, the admissibility of certain evidence, the submissibility of the State's case and the Court's action with respect to instructions, given and refused.

I. Defendant contends the order granting a change of venue from Boone to Cole County conferred no jurisdiction on the Circuit Court of Cole County, because, under his application for a change of venue, the Judge of the

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Boone County Circuit Court was disqualified to make any order except an order disqualifying himself. Boone and Callaway Counties comprise the Thirteenth Judicial Circuit. § 478.107.* Defendant, who had been a Superintendent of Schools, a State Senator, a practicing lawyer, now retired, and a farmer, in an "Application for Change of Venue," filed November 29, 1959, alleged, among other things, that: The opposite party has an undue influence over the mind of the Hon. W. M. Dinwiddie, Judge of this court"; that, in effect, the defendant and the prosecuting attorney had orally agreed the defendant could not have a fair and impartial trial in Boone or Callaway County, and prayed for "a change of venue to some county and some court where this prejudice does not exist." The Court on said day, in the presence of defendant and the prosecuting attorney, entered an order transferring the cause to the Circuit Court of Cole County. Defendant interposed no objection to this order and, so far as disclosed of record, was satisfied with the result obtained.

The granting of a change of venue of the place of trial is a statutory privilege which may be waived. Error on such an application is a matter for preservation in the court granting the change. The point when first made on appeal is too late to avail. State v. Gamble, 119 Mo. 427, 24 S. W. 1030, 1031 (1); State v. Ottinger, Mo., 36 S. W. 2d 942 [1]. See State v. Bailey, 344 Mo. 322, 126 S. W. 2d 224, 228 [6-10], cited by defendant. In State v. Perkins, 339 Mo. 27, 95 S. W. 2d 75, 76 [1-4], Court en Banc held the right to disqualify a judge, like an application for a change of the venue or the place of trial, is a privilege which may be waived either before or after the order has been entered. State v. Hampton, Mo., 172 S. W. 2d 1, 2 [1, 3], states: "Appellant, by filing a motion for continuance in the court to which the cause was transferred, waived any irregularities in the transfer." State v. Naves,

* Statutory references are to R. S. Mo. 1959 and V. A. M. S.

185 Mo. 125, 84 S. W. 1, 2, 4. This defendant invoked the jurisdiction of the Circuit Court of Cole County by filing seven motions for affirmative relief, including the granting of a continuance of the trial of the case. Defendant's contention is overruled.

II. In connection with the foregoing defendant also asserts the Circuit Court of Cole County erred "in refusing the defendant the right to file an application for a change of venue." Defendant's brief states: "this part of the proceeding is not in the transcript." This transcript was approved by, among others, defendant and his attorney. We are bound by the transcript of the record certified here and matters not shown therein cannot be considered or determined. State v. Whitaker, Mo., 312 S. W. 2d 34, 37 [2].

III. Defendant alleges in his motion for new trial: "The court committed error in denying defendant's motion to suppress evidence for the reason that the record shows that the defendant was taken into custody without a warrant and without any reason, and in face of the fact that all the evidence pointed to justifiable homicide and should have been exonerated at the preliminary examination." Defendant's motion sought to suppress evidence relating to the cartridge cases, bullets and pistol found in and taken from his home. He cites "U. S. Constitution, Arts. IV and V of Amendments; Constitution of Mo., Art. I, Secs. 15 and 19; Mapp v. Ohio, 81 Sup. Ct. 1684 [3-5], 6 L. ed. 2d 1081."

The record before us preserves no evidence or proof offered in support of said motion and there is nothing upon which to predicate prejudicial error as the allegations in said motion do not prove themselves. State v. Hepperman, 349 Mo. 681, 162 S. W. 2d 878, 887 [16, 17], rules this issue against defendant.

Furthermore, defendant voluntarily testified at the trial that he got "this gun" and shot Collings. The difference between his and the State's position is that he contends the homicide was justifiable and the State contends it was manslaughter. In view of defendant's admissions he may not now successfully urge prejudicial error. State v. Smith, 357 Mo. 467, 209 S. W. 2d 138, 140 [2, 3], and authorities cited; State v. Bray, Mo. App., 278 S. W. 2d 49, 52 [3]; Annotation, 50 A. L. R. 2d 570, § 8, b.

The State answers this contention on defendant's presentation. In Mapp, supra, seven or more officers forcibly broke into and searched defendant's home under asserted authority of a warrant to search for lascivious books, pictures and photographs, but no search warrant was produced or accounted for at the trial. The Mapp case involved constitutional provisions against unreasonable searches and seizures without a valid search warrant. See Mo. Const., Art. I, § 15. The record before us involves a search incidental to a lawful arrest. This has been recognized as proper by federal courts. Harris v. United States, 331 U. S. 145, 150-153, 67 S. Ct. 1098, 91 L. ed. 1399 [6-10]; Annotation, 4 L. ed. 2d 1983, §§ 2, 6, 7. The evidence at the trial, upon which the State relies, justified the action of the officers. When they arrived defendant invited them in, led them to the kitchen and showed them the dead body, stating the man had been shot. However, when asked who shot him, who the man was, and where the gun was, defendant refused to answer, but demanded that a jury be brought out and they would have a hearing. Defendant did not accuse anyone else of the shooting and was placed under arrest within ten minutes after the officers arrived. The officers had probable cause to believe that defendant had committed a felony. State v. Edwards, Mo., 317 S. W. 2d 441, 445 [2, 3]. Deputy Sheriff Lukehart took defendant to jail in Columbia, secured a coroner's jury and returned with the jury to defendant's farm in about an hour

Deputy Sheriff Duncan and Coroner Perna remained at the farm and assumed control of the premises. Nothing had been disturbed and the members of the jury were cautioned to avoid disturbing anything. After the jury viewed the scene the officers searched the house, which was in defendant's possession at the time of his arrest, picking up the cartridge shells (seen on the dining room floor upon their arrival), three bullets in the kitchen and defendant's automatic pistol in an upstairs bedroom in the course of their investigation. This search for things connected with the crime for which defendant was arrested was incidental to his arrest. State v. Carenza, 357 Mo. 1172, 212 S. W. 2d 743, 745 [2, 3], citing cases and authorities, supra. Clearly, defendant's presentation does not establish the asserted error.

IV. Defendant in his brief alleges the court erred in overruling his motion to produce a signed written statement made on May 25, 1959, by witness Harvey Beavers. We fail to find this point presented to the trial court in defendant's motion for new trial (Sup. Ct. R. 27.20, § 547.030), and, first presented in defendant's brief, it is not preserved for review. State v. Wilson, 361 Mo. 78, 233 S. W. 2d 686 [12]; State v. McCarthy, Mo., 336 S. W. 2d 411, 416 [4, 8]. In addition, defendant states in his brief that the statement "evidently was favorable to the defendant"; but there is no evidence or proof offered in connection with said motion in this record, and hence nothing upon which to predicate preindicial error. Consult State ex rel. Phelps v. McQueen, Mo., 296 S. W. 2d 85 [1, 7]; State v. Kelton, Mo., 299 S. W. 2d 493, 497 [8, 9].

V. On the morning of April 27, 1960, following a motion to quash the jury panel, filed April 26, 1960, and, we understand, the making of the peremptory challenges, defendant filed a motion to quash the twelve-member jury, alleging it was selected from a panel not properly impanelled ac-

cording to law; selected after improper statements and questions by the State on the voir dire examination; and selected after prejudicial statements concerning defendant by veniremen on voir dire examination. The court overruled. Defendant claims error. The State does not question this procedure (see State v. Logan, 344 Mo. 351, 126 S. W. 2d 256 [1-3], 122 A. L. R. 417), but answers defendant's complaint. During the course of the voir dire examination defendant had ample opportunity to protect his rights if the court abused its discretion in any respect. There was no showing of any improper action excluding Negroes from the panel (Logan, supra), if defendant, of the white race, may raise that issue. Defendant in his brief states that pages 26 to 120 of the transcript disclose that "in many instances extreme prejudice was shown against the defendant." Neither this court nor the trial court is required to read the record and speculate what particular instance (or why it constituted prejudicial error) defendant had in mind as falling within a stated conclusion in a motion for new trial or in a brief. Sup. Ct. Rs. 27.20 and 83.05 (a) (3), § 547.030; State v. Gregory, 344 Mo. 525, 125 S. W. 2d 408 [2]. We have studied the voir dire examination and find the court was quick to excuse veniremen concerning whom there was any question and to admonish the panel on proper occasions. We find no error. State v. Weidlich, Mo., 269 S. W. 2d 69, 71 [5]; State v. Taylor, Mo., 324 S. W. 2d 643, 648 [9-11].

VI. Defendant contends his motion for a judgment of acquittal should have been sustained. The jury could find the following facts from the probative evidence considered in the light most favorable to the State (State v. Smart, Mo., 328 S. W. 2d 569, 573 [1]; State v. Hill, Id. 656 659 [1]:

Defendant's house faces west. The entrance on the north to the dining room is used. A kitchen is south of the din

ing room. The back porch is south of the kitchen. An open tool cabinet, with a short handle blacksmith sledge hammer, weighing three to five pounds, on top of it was on the back porch. Defendant kept a .32 caliber automatic pistol in a vanity table in an upstairs bedroom. He had no telephone.

The homicide occurred between 8:30 and 9:00 a. m. Monday, May 25, 1959. Harvey Beavers and defendant were the only witnesses testifying to facts occurring on the 25th leading up to the homicide.

Beavers came to work for defendant Friday, May 22. On the way to the farm from St. Louis, where Beavers was hired, defendant told him Collings was "so weak he can't harness the horse." Beavers and Harold Hayman, who died prior to the trial, occupied two rooms with a door onto the back porch and Collings moved to quarters in defendant's part of the house. Collings was described as 5 feet 4 inches tall, weighing about 133 pounds, a pretty spry old man, smaller than defendant.

Saturday, May 23, after arguing, defendant and Collings went to St. Louis, returning about midnight. Both stated that defendant tried to buy Collings a bus ticket, but Collings wouldn't get out of the automobile. Collings said he couldn't work for nothing and defendant would not pay him. Collings worked on Sunday, telling Beavers he would work a few days more and was going to the law if he was not paid.

On May 25 Collings brought two suitcases to Beavers' room and was ready to go soon after breakfast. Defendant came to the door and said: "I have told you to get out of my house." Collings answered: "I will when you pay me." Defendant said: "I don't owe you a damn penny." Defendant, soon thereafter, called Beavers and Hayman to the kitchen and had them sign a statement that he had told Collings to get out of his house. Collings, upon their

return, told them: "You fellows better get out of there. There is going to be trouble." About fifteen minutes later defendant, in a pleasant manner, asked Collings to show Hayman and Beavers how to feed the cattle. Collings said on the way to the barn: "You reckon that son-of-a-bitch will put something in my suitcase and accuse me of stealing it?" Witness answered: "No." Collings complied with defendant's request, returned to the house and entered the back porch. Beavers, then working about thirty feet away, next saw Collings come off the back porch and walk pretty fast around to the north side of the house, looking upstairs to the windows and saying something. Collings turned back and said: "If I don't get my money there is going to be one dead son-of-a-bitch", and went in through the screen door on the back porch. After a minute or two Beavers heard a racket, like things being turned over, and then shots, one right after another, after which everything was quiet.

After ten minutes or more defendant called Beavers to the house. Defendant had the kitchen door open and when Beavers and Hayman entered said: "There he is." Broken glass from the back door was on the kitchen floor, but Beavers had heard no sound of glass breaking. Defendant, showing Beavers his wrist, said Collings hit him with the hammer. Beavers saw nothing wrong, only a red spot that looked like a mosquito bite, no skin was broken. Beavers suggested defendant call the law and returned to work. Ten or fifteen minutes later defendant asked Beavers to go to town with him and Beavers, Hayman and defendant went to Columbia. Defendant got his mail at the post office. He started back, stopped at a public telephone booth and informed the Sheriff's office that there was "a dead man in my house." Beavers and Hayman went to their room. After a few minutes they went into the dining room. Defendant removed his shirt and had them look where he said Collings had struck him with the ham-

ner on the back of his right shoulder. Beavers could see nothing wrong with defendant's shoulder. Collings' suit cases were near the dining room front door and defendant being asked, answered, "I brought them in here." Dr. R. J. Miller examined defendant, who complained of pain in the right shoulder and left wrist, on May 26. He found no evidence of any injury or bruise on defendant's shoulder, but defendant had superficial scratches of a circular nature on the back of his left wrist. Deputy Sheriff Lukehart testified he put handcuffs on defendant when he took him to Columbia, and when he removed them there was a red mark on the back of defendant's left wrist.

The first time Beavers entered the kitchen Collings' hat was about twelve inches from his head, but it was on his head the second time Beavers was in the kitchen.

Defendant testified Collings had the hammer in his hand while in the yard. Beavers testified Collings did not have the hammer, didn't have anything in his hand while outside the house.

Deputy Sheriffs [illegible]ron Duncan and Pearlie Lukehart and Dr. Vincent Perna, Coroner, arrived at defendant's home about 10:35. Defendant admitted them to the house where they saw the dead body.

Defendant told them the man had been shot, but when they asked him who shot the man, who the dead man was, and where the gun was, defendant would not tell them but would say for them to get a jury out here and we will have a hearing. Collings' body was face down, with his arms underneath, his feet near the dining room door and his head, with his hat on, toward the south, near the kitchen table. The sledge hammer was on the floor twelve to fourteen inches from Collings' head and a newspaper covered the first three or four inches of the handle. Deputy Lukehart, on cross-examination, stated it would be

unusual for the handle to fall, when dropped, underneath a newspaper.

Five spent cartridge cases were on the dining room floor. Two bullets recovered from Collings' body and three found in the kitchen had been fired from defendant's gun. Powder burns indicated that two, perhaps more, shots were fired with the gun in contact, or practically so, with Collings' coat. The testimony established that two fatal bullets, each of which severed or lacerated the aorta, entered Collings' body. The immediate cause of death was massive hemorrhage. Either of the fatal wounds would have caused instant unconsciousness, causing Collings to fall, and death within minutes. Four, perhaps five, bullets struck Collings.

Defendant, his only witness, testified to the effect that he shot in self-defense; that Collings, threatening to kill him and although told to stop, smashed the kitchen door with the hammer and came into the kitchen; that he got his pistol from the dining room table; that Collings was striking at him with the hammer and struck a glancing blow on his left wrist; that he fired; that Collings kept swinging and struck him on the right shoulder; that he fired shots in succession; that Collings stopped, took two steps, and fell in the kitchen, the hammer falling ahead of Collings.

Seven witnesses testified in rebuttal that defendant's reputation for truth and veracity in the community in which he lived was bad. There was no contradictory testimony.

Defendant's guilt or innocence of the offense of manslaughter (State v. Taylor, Mo., 309 S. W. 2d 621, 624 [5-10]) was for the jury. He intentionally shot Collings. The jury was not bound by but could accept or reject any part of defendant's testimony, the same as the testimony

of any other witness. State v. Hill, Mo., 328 S. W. 2d 650, 659 [2, 3], and cases cited; State v. Bartlett, 359 Mo. 884, 224 S. W. 2d 100, 102 [1, 2]; State v. Littlejohn, 356 Mo. 1052, 204 S. W. 2d 730, 732 [1, 2], and cases cited. Defendant's motion for judgment of acquittal at the close of all the evidence was correctly overruled. Any error in overruling defendant's motion for acquittal at the close of the State's case was waived by defendant offering evidence thereafter. State v. McMillian, Mo., 338 S. W. 2d 838, 842 [11].

VII. Defendant's contention that Coroner Dr. Vincent Perna was not qualified to give an opinion as to the effect of the fatal bullets upon Collings' body and as to how long Collings lived after being shot on the grounds there was no attempt to qualify the witness and the further reason that his testimony was prejudicial and was not based upon any scientific or actual facts is without merit. No authority is cited. Defendant's assertions that no attempt was made to qualify Dr. Perna are refuted by the record. The witness performed an autopsy and his testimony was based on facts ascertained by him. State v. McLaughlin, 149 Mo. 19, 50 S. W. 315, 318 [1]. See 32 C. J. S., Evidence, § 480.

VIII. Defendant states: "The Court committed reversible error in permitting prosecuting attorney to cross-examine the Defendant on matters not relevant to his testimony given directly, and which testimony and cross-examination was argumentative in that it required the Defendant to directly dispute the testimony of the State's witnesses and to permit Prosecuting Attorney to argue with and badger the Defendant." Defendant cites only State v. Mann, 83 Mo. 589. The contention is not well taken for several reasons. The cited case does not disclose prejudicial error on the issue presented. Defendant's motion for new trial does not specify what testimony, or

what specific arguing with or badgering of defendant is involved, and does not comply with the requirement that motions for new trial "must set forth in detail and with particularity, in separate numbered paragraphs, the specific grounds or causes therefor." Sup. Ct. R. 27.20; § 547.030; State v. Crocker, Mo., 275 S. W. 2d 293, 297 [3]. The point in the motion for new trial and in the brief must be based upon objections made and the reasons assigned at the time the error occurs. State v. Slaten, Mo., 252 S. W. 2d 330 [3]; State v. Washington, Mo., 320 S. W. 2d 565 [8]. We have examined the forty-odd pages of this cross-examination and, as we read the transcript, the court, upon proper objection, was restricting the cross-examination to matters falling within the direct examination of defendant. The contention is overruled.

IX. During the examination of Dr. Perna the prosecuting attorney asked if "the force of these bullets and these two particular wounds" would have caused Collings' body to spin to the left. Defendant's attorney stated he did not know which particular wounds were being inquired about. The court said "* * * why don't you include in the question which wounds? This case might sometime be looked at by another court." Defendant's counsel, out of the hearing of the jury, requested a mistrial on the ground the last remark of the court gave the jury the impression a verdict of guilty would be returned and the defendant would appeal. This was refused. Defendant in his brief mentions another remark made by the court in chambers and out of the presence of the jury to which no objection was and properly could not have been taken. Defendant's brief is misleading. Defendant relies on State v. Castino, Mo., 264 S. W. 2d 372, 374, wherein defendant had asked a separate trial and the court informed the veniremen that the proceeding had been commenced against three defendants and one had pleaded guilty but had not

been sentenced. In the instant case the court's statement was prompted by a suggestion from defendant's counsel, was addressed to the attorneys, and its purpose was to have the written record clear, which appears to have been the original purpose of defendant's attorney. The remark may not have been necessary but it was not prejudicial error. State v. Young, 105 Mo. 634, 641, 16 S. W. 408 [5]; Annotation, 132 A. L. R. 680 (II, b). Consult State v. Brotherton, Mo., 266 S. W. 2d 712, 716 [5-7]; 23 C. J. S., Cr. Law, § 989.

X. Defendant complains of the State's rebuttal testimony that his reputation for truth and veracity was bad. Defendant's authorities (26 Am. Jur., Homicide, § 342; 20 Am. Jur., Evidence, § 325, and Kirby v. State, 25 Okla. Cr. R. 330, 220 P. 74, 33 A. L. R. 1212) do not rule the issue presented. By taking the stand defendant's credibility as a witness became an issue and testimony that his reputation for truth and veracity was bad was proper in rebuttal. State v. Ferguson, 353 Mo. 46, 182 S. W. 2d 38, 41 [8], citing authority; State v. Kain, Mo., 330 S. W. 2d 842, 845 [3]; § 546.260. That the State's witnesses were not friendly to defendant went to the credibility and weight of their testimony, not its admissibility.

XI. The court submitted to the jury, among others, instructions on murder in the second degree (instruction No. 5; see § 559.020) and on manslaughter (instruction No. 6, see § 559.070). A complaint in defendant's motion for new trial common to each of said instructions is that defendant was charged with murder in the first degree and, under the evidence, was guilty of murder in the first degree or not guilty. We held supra (¶ VI) that the State made a submissible case. Furthermore, § 559.030 provides that upon a trial for murder in the first degree the jury must inquire and ascertain, under the instructions, whether defendant be guilty of murder in the first

or second degree. Section 556.220 provides: "* * * and any person found guilty of murder in the second degree, or of any degree of manslaughter, shall be punished according to the verdict of the jury, although the evidence in the case shows him to be guilty of a higher degree of homicide." See also § 545.030 (17); Supt. Ct. R. 26.06. The law has been changed, and the cases cited by defendant bearing on the issue (State v. Bailey, 57 Mo. 131, 133; State v. Mahly, 68 Mo. 315, 318) are no longer the law. State v. Murphy, 341 Mo. 1229, 111 S. W. 2d 132, 137 [18-20], and authorities cited. In addition, having been convicted of manslaughter, defendant may not successfully assert prejudicial error in an instruction submitting a higher degree of the offense on trial whether such instruction be right or wrong. State v. Foster, 355 Mo. 577, 197 S. W. 2d 313, 319 [12]; State v. Nolan, 354 Mo. 980, 192 S. W. 2d 1016, 1022-[15]; State v. Goodwin, 271 Mo. 73, 195 S. W. 725, 729 [9].

XII. The court instructed on self-defense. The instruction on manslaughter (No. 6) defined "manslaughter" as the "killing of a human being not herein declared to be murder or excusable or justifiable homicide" (§ 559.070) and then required the jury to find facts and circumstances requisite to a finding of guilt of manslaughter, specifically excluding excusable or justifiable homicide and a finding that the killing was not in the lawful defense of defendant's person. The instruction then defined "excusable homicide" as "the accidental killing of another" (§ 559.050), and "justifiable homicide" in the language of § 559.040 (1, 2, 3). Defendant says said instruction "is erroneous in that it couples the crime of manslaughter with excusable homicide and three degrees of justifiable homicide," which is alleged to confuse a jury to such an extent "that they could not return a verdict based upon the testimony adduced." Before the jury could find defendant

guilty of manslaughter under the instruction it was required to find, so far as involved in defendant's complaint, that the killing was not the result of an accident (excusable homicide) or the result of any of the situations set forth in § 559.040 (justifiable homicide). It authorized an acquittal of manslaughter if any of the submitted factual situations were found by the jury whether or not the evidence was sufficient to support such a finding. All this put a greater burden on the State than was required of an instruction restricted to the defenses of excusable or justifiable homicide within the evidence, and the error being in favor of defendant, he was not prejudiced and is in no position to complain on the grounds assigned. Consult State v. Farrell, 320 Mo. 319; 6 S. W. 2d 857, 859 [7, 8]; State v. Pillow, Mo., 169 S. W. 2d 414, 418 [11, 12].

XIII. Defendant says reversible error was committed in not giving an instruction on and in refusing defendant's requested instruction No. 5 on the defense of defendant's home. Did defendant's testimony, the only evidence on the issue, entitle defendant to such an instruction? Sup. Ct. R. 26.02 (6); § 546.070 (4).

Defendant testified he intended to go to Iowa that day and had promised to take Collings to Columbia. He took his automatic pistol from upstairs and placed it on the dining room table. This, he said, was his custom so that the gun would be there when he returned at night. Collings, after complying with defendant's request to show Beavers and Hayman what to do at the barn, was entitled to return to obtain his suitcases which were in defendant's house. Defendant testified as follows: While in the kitchen he saw Collings through the glass of the kitchen door on the back porch. Collings had the hammer and said: "I am coming in and kill you, you son-of-a-bitch." He told Collings to stop but Collings came into the kitchen, smash-

ing the door with the hammer and breaking the glass. Defendant then went into the dining room, a distance of about twelve feet, and got his gun. He came back to a position between the dining room table and the kitchen door, and tried to get Collings, who was already in the room and who was coming at him threatening to kill him and striking at him with the hammer, to stop. Collings struck him on the wrist and swung at his head. Defendant then fired the first shot, which he thought missed. Collings then struck him on the right shoulder and defendant fired several shots in succession while Collings was still swinging at him with the hammer. Collings took two steps and fell on the kitchen floor. Defendant further testified that he "acted in self-defense"; "I know I fired because I thought it was his life or mine"; "I was excited and I was scared. I was in danger"; and "Q. And after the first shot you did not retreat any further? A. Oh, I don't know, I don't suppose I did. I was firing to save my life."

The Missouri statutes provide that every homicide shall be murder in the first degree (§ 559.010), or murder in the second degree (§ 559.020), unless it be excusable or justifiable homicide by reason of statute or the common law (§ 559.060), and the statutes then define justifiable homicide (§ 559.040) and excusable homicide (§ 559.050). The statutory definition of justifiable homicide, insofar as it pertains to a dwelling house, does not include all of the common law defense of habitation. Section 559.070 provides that every killing of a human being, not declared to be murder or excusable or justifiable homicide, shall be deemed manslaughter. The trial court instructed on manslaughter, and in doing so instructed in the terms of the statute as to what constituted statutory excusable and justifiable homicide. If defendant was entitled to an additional instruction it is because the evidence established

a right to an instruction on the common law defense of habitation.

This defense at common law apparently arose as an exception to the common law duty to retreat when attacked, if feasible under the circumstances to do so, before one was justified in taking a life. Some confusion has arisen because of a too broad interpretation of the phrase, "a man's home is his castle". After reviewing the common law this court held that this maxim was a limitation on the duty to retreat. "'When a person is attacked in his own house, he need retreat no further. Here he stands at bay, and may turn on, and kill his assailant if this be apparently necessary to save his own life; nor is he bound to escape from his house in order to avoid his assailant.' 'In this sense, and in this sense alone, are we to understand the maxim that "every man's house is his castle."'" State v. Taylor, 143 Mo. 150, 44 S. W. 785, 789. See also 26 Am. Jur., Homicide, § 155.

The principal feature of the defense of habitation, when applied to the facts of this case, is that under certain circumstances one is justified in committing a homicide to prevent an **entry** to the home or dwelling. "When an assault on a dwelling and an attempted forcible entry are made under such circumstances as to create a reasonable apprehension that it is the design of the assailant to commit a felony or to inflict on the inmates a personal injury which may result in the loss of life or great bodily harm, the danger that the design will be carried into execution being imminent and present, the lawful occupant of the dwelling may lawfully **prevent the entry**, even by the taking of the life of the intruder." (Emphasis added.) Vol. I, Wharton, Criminal Law and Procedure, § 220. See also the statements in 26 Am. Jur., Homicide, § 166; 40 C. J. S., Homicide, § 109; and in the annotation comment and cases cited in 25 A. L. R. 508 and 34 A. L. R. 1488.

The cases where the precise issue has been raised are few. In Taylor v. State, 27 Ariz. 228, 232 Pac. 552, the deceased had made threats from outside the dwelling and had opened the screen and door by opening the latch in some manner. After entering the house and when about two paces inside he pushed one person aside and started on into the room and was shot by the defendant. The court held: "It is clear, however, the shot was not fired to prevent deceased from entering the house, for that he had done without meeting any physical resistance. The assault on the house was an accomplished fact, and defendant could not punish the act, however wrongful, by taking the intruder's life. * * * The shooting of deceased by defendant must be justified, if at all, as necessary or apparently necessary to protect her own life, or to protect herself from great bodily harm, and she must have acted under a reasonable apprehension that her life was in immediate danger."

In State v. Sorrentino, 31 Wyo. 129, 224 Pac. 420, 34 A. L. R. 1477, two boys burglariously entered a house to steal moonshine whiskey. After entering the kitchen by using a key to unlock the door they went to a bedroom and one was shot by defendant. The court stated: "A man has the right to prevent, in his home, the commission of a felony or the infliction on any of its inmates of a personal injury which may result in the loss of life or in great bodily harm. The right is limited to prevention; it does not extend to punishment for an act already committed. * * * After the deceased had entered, though burglariously, and after he was in the house, the defendant had no right to kill him for the act of entry already committed." See also Horton v. State, 110 Ga. 739, 35 S. E. 659; Carroll v. State, 23 Ala. 28, 58 Am. Dec. 282; People v. Davis, 412 Ill. 391, 107 N. E. 2d 607. The applicable rule is clearly stated in Vol. I, Wharton, Criminal Law and Procedure, § 222, as follows: "A person has a

right to prevent in his home the commission of a felony or the infliction on any of its inmates of an injury which may result in loss of life, or great bodily harm, but he cannot justify or excuse the slaying of a person in his house, for acts already done. When attacked in his own house, one may justify or excuse the killing of his assailant if such act is apparently necessary to save his own life or to protect himself from great bodily harm. In such case, it is the question of the law of self-defense and not the law of defense of habitation which is involved." In 40 C. J. S., Homicide, § 109 (c) at pp. 974-5, in discussing the nature of the intrusion of a habitation, it is stated: "A burglar may be lawfully killed by the owner of a house, where the burglar or thief is at the time committing a felony by attempting to break into and burglarize the house, or even though he is atempting to escape; but after he has entered, although burglariously, the owner has no right to kill him for the act of entry already committed."

It is apparent that the rules pertaining to the defense of habitation authorize certain protective acts to be taken earlier than they otherwise would be authorized, that is, at the time when and place where the instruder is seeking to cross the protective barrier of the house. But once the intruder has crossed that barrier without resistance from the occupant of the house there is no occasion to kill him in order to keep him out because he is already in, and the occupant is not authorized by law to punish for the wrongful entry. Therefore, what protective action the occupant may take after the aggressor has effected his entry depends upon the facts and circumstances then existing, and a homicide then occurring is justifiable only under the usual rules of self-defense or to prevent therein the commission of a felony, except that there is no duty to retreat.

Applying these rules to the evidence in this case we find that according to defendant, Collings had threatened him from outside the house and that defendant warned him to leave. By reason of those threats and the menacing acts of Collings defendant could reasonably have believed his life was in danger, and he could have used such force as necessary to repel Collings at the threshold of his house to **prevent an entry.** However, Collings made his entry and was inside the house before defendant sought to stop him with physical resistance. The entry was then an accomplished fact; the barrier had been crossed. Under the evidence most favorable to defendant the shooting did not occur before or while Collings was in the act of entering, and defendant did not testify or even imply that he shot Collings to prevent an entry into his house. Under the common law of the defense of habitation defendant had no right to punish deceased for the unlawful entry already completed. Collings was in defendant's house, following his forcible entry, for the stated purpose to kill defendant, and defendant affirmatively stated that the reason he intentionally shot Collings was in self-defense and to save his own life. Defendant's right to commit a homicide when attacked in his house is governed by the law of self-defense as stated in Vol. I, Wharton, Criminal Law and Procedure, § 222, supra, and in this respect the court gave an instruction on self-defense, in which the jury was told, among other things, "that the law did not require the defendant to retreat or to wait until he was actually attacked."

We need mention only briefly the cases cited and relied on by defendant. State v. Shiles, Mo., 188 S. W. 2d 7, pertains to the defense of property. There the deceased and defendant engaged in an encounter in the defendant's place of business. The deceased then left but returned and made threats against defendant. The defendant shot

the deceased when he "had one foot in the doorway." In State v. Taylor, 143 Mo. 150, 44 S. W. 785, the issue here presented was not involved, but the case pertained to whether one is justified in committing a homicide to prevent a mere trespass on his habitation. The shooting there took place to prevent an entry into the house, but a conviction of second degree murder was sustained. Morgan v. Durfee, 69 Mo. 469, was a civil suit. The somewhat loose language there used, which is quoted and relied on by defendant, with reference to the right of one to defend his dwelling being superior to the defense of his person, was not concurred in by any of the other members of the court. Possibly this language has reference to the exception to the duty of one to retreat under the law of self-defense when attacked in his habitation, see Carroll v. State, 23 Ala. 28, 58 Am. Dec. 282, but if so the jury was fully instructed as to this. The observations in State v. Pollard, 139 Mo. 220, 40 S. W. 949, were made in criticizing an instruction too favorable to the defendant who was charged with and found guilty of murder. No question was involved concerning the defense of habitation by the defendant, but the observations there made are consistent with the views here expressed.

We must and do conclude that the instructions which were given submitted all the defenses to which defendant was entitled under the applicable law.

Our examination of the matters we inquire into under Sup. Ct. R. 28.02 discloses no reversible error.

The foregoing disposes of all issues for consideration on this review.

The judgment is affirmed.

Exhibit A.

(Emblem)

Clerk of the Supreme Court
State of Missouri
Jefferson City, Missouri

Marion Spicer
Clerk

Telephone
6-3715

February 12, 1962.

Mr. W. A. Brookshire, #04035
P. O. Box 900
Jefferson City, Missouri

In re: State v. Brookshire, No. 48,488

Dear Sir:

The court has this day made the following order in the above-entitled case:

"It is ordered that 'Appellant's Petition for Rehearing' containing also an alternative prayer for the transfer of this cause to the Court en Banc be and it is hereby overruled. It is further ordered that the other paper writing filed contemporaneously therewith on January 23, 1962, purporting to be, and which is entitled 'Motion for a Rehearing or, in the Alternative, to Transfer to the Court en Banc' and also Appellant's 'Suggestions in Support of Motion for Rehearing or, in the Alternative, to Transfer to the Court in Banc' filed on February 8, 1962, be and the same are stricken from the file for the reason that they are scandalous, impertinent and scurrilous."

Yours truly,

Marion Spicer,
Clerk.

cc—Attorney General

APPENDIX B.

In the
Supreme Court of Missouri,
Division Number One,
September Session, 1961.

Dorothy C. Contestible, Administratrix of the Estate of Ralph Burton Collings, Deceased, Respondent. v. W. A. Brookshire, Appellant.	No. 48,581.

(Duplicate of Filing on Jan. 8, 1962 in Office of Clerk Supreme Court.)

Appeal from the Circuit Court of Audrain County,
Honorable James D. Clemens, Special Judge.

Per Curiam:

Action under the Wrongful Death Act, §§ 537.080 and 537.090, R. S. Mo. 1949, V. A. M. S., for $25,000 damages for the death of Ralph Burton Collings who, according to the petition filed by his daughter, the administratrix of his estate, was wrongfully and maliciously shot and killed by defendant. Ten members of the trial jury returned a verdict for plaintiff for $17,000. Defendant has appealed from the judgment rendered on the verdict.

Plaintiff's petition recited Collings' death, plaintiff's appointment as administratrix of the estate of deceased, and plaintiff's and her brother's survivorship and heirship; charged that on May 25, 1959, on defendant's farm in Boone County defendant wrongfully and maliciously killed Collings by shooting him with an automatic pistol:

alleged that Collings contributed from his earnings and labor to the support of plaintiff that the killing was of an aggravated and malicious character, and prayed for actual and exemplary damages in the total sum of $25,000. Defendant's answer denied the killing was malicious and wrongful and alleged that "defendant was acting in the defense of his dwelling when the said Ralph Burton Collings was in the commission of a felony in said dwelling and was further acting in the defense of his own life and under Section 559.040, R. S. Mo. 1949, these acts constituted justifiable homicide."

Defendant contends the circuit court lacked jurisdiction because the Probate Court of Boone County had no authority to issue letters of administration; that § 473.010, R. S. Mo. 1949, provides that letters of administration shall be granted in the county in which the domicile of the deceased is situated, or if he had no domicile in this state, in any county wherein he left any property; that deceased resided at plaintiff's home in the City of St. Louis, and possessed no property whatever. Plaintiff's application for letters stated that the "last residence" of deceased was Boone County. The Probate Court of Boone County found that deceased was "late of the County of Boone," and issued letters of administration on his estate, appointing plaintiff as administratrix. The Probate Court's determination of deceased's residence is the judgment of a court of record, valid until vacated, Thompson v. Kansas City, C. C. & St. J. Ry. Co., 224 Mo. App. 415, 27 S. W. 2d 58, or set aside in a direct proceeding, In re Davidson's Estate, 100 Mo. App. 263, 73 S. W. 373, the verity of which is conclusive against collateral attack by proof that deceased was a resident of another county, In re Sheldon's Estate, 354 Mo. 232, 189 S. W. 2d 235; State v. Fidelity & Deposit Co., 317 Mo. 1078, 298 S. W. 83; Johnson v. Beazley, 65 Mo. 250; In re Greening's Estate, 232 Mo. App. 78, 89 S. W. 2d 123.

On the merits, defendant contends initially that plaintiff failed to prove her case because the evidence offered by plaintiff, coupled with the cross-examination of defendant, "clearly establishes that the killing was justifiable homicide." Since defendant admitted in his answer, on the stand and in oral argument that he shot and killed deceased (not under any claim of accident or misfortune, but intentionally), we need not review the evidence to determine whether plaintiff made a submissible case of intentional killing independent of defendant's admissions. Unquestionably a case was made on defendant's admissions, unless plaintiff is bound by the testimony of defendant that the killing was justifiable. Nor is there any necessity under this point to review defendant's testimony as to the facts surrounding the killing. Suffice it to say that defendant testified to facts which, if believed, tended to show defendant killed Collings under justifiable circumstances. The decisive first question, therefore, is whether plaintiff is bound by defendant's testimony in justification. If so, defendant's motion for a directed verdict should have been sustained.

Plaintiff called defendant as an adverse witness for the limited purpose of establishing defendant's wealth and financial standing on the issue of punitive damages. Plaintiff asked defendant no questions except with respect to his financial standing. At the conclusion of defendant's testimony on this limited issue the court permitted defendant's counsel to cross-examine defendant in great detail as to the facts and circumstances surrounding the killing. After defendant's recital of his version of the facts surrounding the killing, counsel for plaintiff did not examine defendant further nor did plaintiff introduce any evidence to impeach, contradict or rebut the facts testified to by defendant in justification. Since defendant's testimony in justification was given after he had been called to the stand as a witness for plaintiff, defendant

claims plaintiff thereby vouched for defendant's credibility and was bound by defendant's uncontradicted and unimpeached testimony that defendant shot and killed Collings under justifiable circumstances; that this testimony completely destroyed plaintiff's case and entitled defendant to a directed verdict. Defendant's claim is without foundation. "What he (defendant) said in his own behalf did not in any way bind the plaintiff. Where a party desires to prove an essential element of his case by his opponent, he is permitted to do so, and he is only bound by that part of his adversary's testimony for which he vouches for as the truth and he is free to show facts contradictory of all other testimony given by the adverse party. Lolordo v. Lacy, 337 Mo. 1097, 88 S. W. 2d 353, loc. cit. 355; Richeson v. Roebber, 349 Mo. 132, 159 S. W. 2d 658, 141 A. L. R. 1; Missouri Cafeteria v. McVey, 362 Mo. 583, 242 S. W. 2d 549." Hall v. Brookshire, Mo. App., 285 S. W. 2d 60, 64. (Parentheses supplied.)

Next, defendant claims reversible error was committed in the giving of Instructions Nos. 1, 2, 3 and 4.

No. 1 instructed that the jury was not required to find that deceased met his death at the hands of defendant, because the shooting and killing of deceased was admitted by defendant; that if the jury found that plaintiff was the duly appointed administratrix and that the killing was without just cause or provocation and not done in the defense of defendant's person or dwelling; and found the survivorship of a son and a daughter and that plaintiff "was receiving pecuniary benefits from and contributed by" deceased "in the form of money, tasks performed by deceased and services rendered by him," then the jury should find a verdict for plaintiff and against defendant. Defendant's objections to No. 1 are that it does not properly declare the law "in that the jury is told that they did not need to find that the defendant killed the deceased;" that No. 1 fails to instruct "that the burden was

upon the Plaintiff to prove beyond a reasonable doubt "that the Defendant had committed the crime of murder" and that the killing was done from a criminal intent; that there was no evidence of the commission of a crime or of a malicious killing; that the statement in No. 1 with reference to pecuniary benefits confused the jury; and that No. 1 "failed to inform them of the burden of proof upon each and every issue." We find no fault with Instruction No. 1. Defendant's admissions that he intentionally killed Collings made a prima facie case for plaintiff, dispensing with the necessity of plaintiff proving or the jury finding that fact. It would have been error to instruct the jury that the burden of proof was upon plaintiff to prove beyond a reasonable doubt that defendant committed the crime of murder. This is a civil case. The burden of proof in such a case is by a preponderance of the evidence, not beyond a reasonable doubt. Plaintiff was not required to establish criminal intent or the crime of murder. Plaintiff, suing under the Wrongful Death Act, § 537.080, R. S. Mo. 1949, V. A. M. S., was only required to establish the death of Collings "by a wrongful act." The intentional killing of a human being is a wrongful act, unless it is done under circumstances which justify or excuse homicide. No. 1's reference to the pecuniary benefits which plaintiff had been receiving from her father is not confusing, as charged. No. 1's failure to "set out the amount of money furnished or the value of the services rendered * * * nor the manner in which such damages were to be ascertained," is not error. It was not necessary to include these elements in No. 1. The measure of damages was dealt with in separate instructions. Nor was No. 1 erroneous in failing to inform the jury of "the burden of proof upon each and every issue." The burden of proof was properly instructed upon in separate Instructions Nos. 2 and 3.

Defendant's objection to Instruction No. 2, which instructed that the burden was upon plaintiff to prove her

case by the preponderance of the credible evidence, is that it "left with the jury the authority or power to determine the greater weight or preponderance of the evidence," and that the concluding part of No. 2 (telling the jury that if the evidence preponderated in plaintiff's favor, this would be sufficient to sustain the burden of proof) was unnecessary, unwarranted, confusing and misleading. This criticism is insubstantial. It is fundamental that in a civil case it is the proper province and function of the jury to determine where the greater weight or preponderance of the evidence lies, and the concluding part of the instruction is a correct statement of law.

Defendant assails Instruction No. 3 on the ground that it "clearly casts upon the Defendant the burden of proof and informed the jury that the burden of establishing the guilt of the Defendant was not upon the Plaintiff but rested upon the Defendant himself, which is contrary to both the civil and criminal burden of proof." Justification is an affirmative defense; a plea in the nature of a confession and avoidance. Matters constituting an avoidance or affirmative defense must be affirmatively pleaded, § 509.090, R. S. Mo. 1949, V. A. M. S.; Prewitt v. Witte, 224 Mo. App. 836, 26 S. W. 2d 1020, and the burden of proof on all affirmative defenses rests upon the defendant, as the asserting party. Gennari v. Prudential Insurance Company of America, Mo. Sup., 335 S. W. 2d 55, 60; Rucker v. Alton R. Co., 343 Mo. 929, 123 S. W. 2d 34, 31 C. J. S., Evidence, § 104, p. 711. The burden was upon defendant to prove his affirmative defense of justification. Judge Lamm expressed it this way, in Morgan v. Mulhall, 214 Mo. 451, 114 S. W. 4, l. c. 6; "[A] plaintiff, hit by a bullet, may identify the shooter, prove the hit, and quit. At that point the burden [of going forward] shifts, and the law, as well as the good sense of it, puts the boot on defendant's foot and the laboring oar in his hands—he must justify or otherwise lawfully excuse the shot."

(Brackets supplied.) No. 3 properly fixes upon defendant the burden of proof with respect to the affirmative defense of justification.

Defendant attacks Instruction No. 4, on actual and punitive damages, which concluded as follows: "The Court further instructs the Jury that if you find a verdict for the plaintiff that your verdict must be in one lump sum . . . ." Defendant claims that No. 4 constituted a roving commission to find the value of deceased's assistance to plaintiff, erroneously directed the jury to find in one lump sum, instead of assessing actual and punitive damages separately, "wholly fails to declare the law governing actual and punitive damages in a wrongful death action." Neither in his point nor in the argument does defendant elucidate or explain his charge that No. 4 constitutes a roving commission, or demonstrate in what respect No. 4 fails to properly declare the law in this type of action. Accordingly, our review is limited to the allegedly improper direction of No. 4 that the jury return a lump sum verdict without separate assessment of actual and punitive damages. Cooksey v. Ace Cab Company, Mo. Sup., 289 S. W. 2d 40; Lewis v. Watkins, Mo. App., 297 S. W. 2d 595. Section 509.260, R. S. Mo. 1949, V. A. M. S., provides that "In actions where exemplary or punitive damages are recoverable, the petition shall state separately the amount of such damages sought to be recovered." Section 510.270, R. S. Mo. 1949, V. A. M. S., provides that "* * * When exemplary or punitive damages are allowed by the jury, the amount thereof shall be separately stated in the verdict." These sections, however, have no application to a proceeding under the wrongful death statutes. Spalding v. Robertson, 357 Mo. 37, 206 S. W. 2d 517, and authorities cited, l. c. 521 [4]. Section 537.090, R. S. Mo. 1949, V. A. M. S., as amended Laws 1955, p. 778, § 1, provides that "In every action brought under section 537.080, the jury may give to the surviving party or parties who

may be entitled to sue, such damages, not exceeding twenty-five thousand dollars, as the jury may deem fair and just for the death and loss thus occasioned, with reference to the necessary injury resulting from such death, and having regard for the mitigating or aggravating circumstances attending the wrongful act, neglect or default resulting in such death." Under this statute any amount above compensation is penalty. La Bella v. Southwestern Bell Telephone Co., 224 Mo. App. 708, 24 S. W. 2d 1072, 1077, and it is a matter within the discretion of the jury to say how much compensation and how much penalty in the aggregate shall be awarded. There is no requirement by statute or decision, that the trial court direct the jury to separately state the amount of the actual and punitive damages to be awarded in wrongful death actions. The decided case law is to the effect that these amounts need not be separately stated. La Bella v. Southwestern Bell Telephone Co., supra. The court did not err in directing the return of a lump sum verdict in this case.

Next, defendant claims reversible error was committed in refusing to give defendant's proffered Instructions Nos. 8 and 9.

No. 8 instructed the jury that under the law and evidence "plaintiff is not entitled to recover punitive damages." Defendant's objection is that "there was an utter and entire absence of any evidence whatever justifying the submission of the issue of punitive damages to the jury." We are of the opinion that the submission was proper; that there was ample evidence to sustain the submission of malicious killing without just provocation. Eliminating defendant's theory of violent invasion of defendant's home and violent assault on defendant's person, which the jury had the right to disbelieve, there was no lawful provocation. During the few weeks Collings had lived and worked on defendant's farm, he had done some painting on defendant's house. Defendant, dissatisfied,

claimed to have been damaged to the extent of $50 by Collings' use of the wrong type of paint. Collings had taken a $20 bill defendant gave him and gave it to a woman who came to the farm to get paid for some hay. Collings felt that defendant "should give him that $20 back," and had mentioned it to defendant "a time or two." Defendant claimed that he gave Collings the custody of a blind, registered cow to feed and care for but that because of Collings' neglect the cow, worth $300, had died. The arrangement between defendant and Collings had become unsatisfactory to defendant. Although they "had no arguments" and defendant said the relationship was "very pleasant," defendant did not consider Collings a "valuable hand." On the morning of May 25, 1959 defendant told Collings he expected the latter to leave. Collings said, "Well, I will leave when you pay me what you owe me." Defendant retorted, "I don't owe you anything," claiming that he had paid Collings for all services rendered. The foregoing, testified to by defendant, was uncorroborated. Collings was 63 years old, of slight build, five feet four inches in height, 135 pounds in weight. He was not a strong man. He was a mild mannered man who had never been known to harm, attack or fight with anyone or to have been in any trouble, either with the police or other persons. It stands admitted that defendant shot Collings to death with an automatic pistol, using five separate bullets. At least two of the bullets tore into the vital parts of Collings' body in such a manner as to cause unconsciousness and death almost instantly. After the killing defendant drove 11 miles to town, picked up his mail at the post office, and then called the sheriff's office, telling the officer in charge there was a dead man down at his house and that he "wanted somebody to come down there some time that day." Defendant's testimony in justification was that Collings threatened to kill defendant, broke into his house brandishing a five pound hammer in his

hand, advanced upon defendant swinging the hammer in a menacing manner and in close proximity to defendant's head, striking glancing blows upon defendant's shoulder and hand; that defendant retreated from the kitchen to the dining room, and finally shot Collings in order to save his own life. The jury, however, had the right to disbelieve, State v. Brookshire, Mo. Sup., ... S. W. 2d ... (handed down concurrently herewith), and evidently did disbelieve defendant's testimony in justification. That testimony eliminated, and given defendant's admissions that he shot and killed a mild and innocuous person, there was nothing left but defendant's account of the foregoing trivial disagreements to justify the killing. This constituted no lawful provocation for the killing and consequently there was no error in submitting malicious killing without just provocation.

Refused Instruction No. 9 stated that "when a witness is called the party calling the witness vouches for the credibility of such witness and is bound by the testimony given unless there is testimony given by other witnesses that contradicts the evidence given by the witness called." Defendant repeats his contention that plaintiff was bound by defendant's testimony in justification by placing defendant on the stand and examining him at length on his life, education, financial standing and worth; by "participating" in defendant's cross-examination of defendant, and by failing to offer evidence contradicting or casting doubt upon defendant's testimony given in justification. Defendant says the court should have given No. 9, by which the jury would have been instructed that plaintiff was so bound. The quotation from Hall v. Brookshire, supra, 285 S. W. 2d, l. c. 64, disposes of this contention adversely to defendant's contention.

Defendant seeks a reversal of the judgment for refusal to discharge the jury because of a remark made by one

of the jurors during defendant's final argument. By Instruction No. 5 the jury had been told that if Collings forcibly entered defendant's home and assaulted defendant with a hammer defendant was not obliged to retreat, but was privileged to defend his home and use the means absolutely necessary to repel Collings. In discussing No. 5 and its reference to forcible entry, defendant argued "——well, he [Collings] did forcibly enter; he broke the glass in the back door and——" At this point a juror interrupted and said, "That's what you say he did. He's dead. How ya gonna prove it?" Defendant did not object to the juror's interruption or ask the court at that time to take any affirmative action. On its own initiative the court admonished the juror not to interrogate counsel, and directed the defendant to "go ahead." Defendant proceeded to complete his argument, making no reference to the incident until he finished, at which time, out of the hearing of the jury, he moved for a mistrial on the ground that the juror had "made up his mind or is prejudiced" and that defendant could not have a fair and impartial trial with a man like that on the jury. The court denied the motion. The juror who asked the question did not join in the ten-member verdict. This point is disallowed for two reasons. First, defendant waived the objection by not objecting at the time of the occurrence to the alleged misconduct of the juror. Second, the propriety of a mistrial for alleged misconduct on the part of a juror rests largely within the discretion of the trial court. The court, with the jurors before it, was in an advantageous position to determine whether the remarks of the juror had any effect on or prejudiced defendant's rights. The court did not regard the incident as significant. There is nothing in the remarks themselves or in the circumstances under which they were made indicating that the court abused its discretion in not taking further action than it did when it indicated its disapproval of the

juror's interrogation. Robb v. Bartels, Mo. App., 263 S. W. 1013, 1016.

Defendant says the jury should have been discharged because of an argument made by plaintiff's attorney, which defendant brands as improper, prejudicial and untruthful. Plaintiff's attorney, referring to defendant's previous argument, told the jury, "Mr. Brookshire said to you that we vouch for him and for the truth of what he says. Nothing could be further from the truth!" Defendant objected on the ground that a party putting a witness on the stand vouches for his credibility. The court overruled and permitted plaintiff's counsel "to respond to the argument that was made by the defendant." It is the policy of the law to indulge a liberal latitude in argument, especially where the argument is a fair retort to the preceding argument of opposing counsel. Riley v. St. Louis Public Service Co., Mo. App., 245 S. W. 2d 666, and cases cited, l. c. 673. Defendant had argued that "It is as clear as the noonday sun" that when you place a witness on the stand you vouch for his credibility and status. "They put me on the stand. * * * They vouched for my credibility." Defendant's argument was a partial misstatement of the law of this case. Plaintiff placed defendant on the stand for the limited purpose of testifying as to defendant's wealth. Plaintiff did not thereby vouch generally for defendant's credibility as a witness, or for the truth of defendant's testimony in justification of his taking Collings' life, as defendant sought to tell the jury, but only sought admissions bearing on a single issue. The argument made by plaintiff's counsel, provoked by and in answer to defendant's improper argument, was within bounds and the court properly allowed plaintiff's counsel to make it.

Defendant's final point is that "The Court committed reversible error in permitting the introduction of Plain-

tiff's evidence which was obtained without a search warrant and without the consent of the Appellant." This is wholly insufficient to preserve anything for review. It fails to particularize and specify what evidence should not have been admitted. Nibler v. Coltrane, Mo. Sup., 275 S. W. 2d 270, 274 [5]. Going to the argument, however, we find that defendant's complaint relates to a revolver and hammer, which were removed from defendant's house without a search warrant and without his consent. The admission of the gun in evidence was not error because the gun was obtained in the course of a search incidental to a lawful arrest. State v. Brookshire, supra. (The facts held sufficient to justify the action of the officers in the criminal case are the same as in this civil case.) Furthermore, when the gun was offered in evidence defendant said: "I admit that it is my gun and I admit that it is the one I used." These voluntary admissions destroyed defendant's right to now insist upon the protection of his constitutional guaranties, for defendant thereby admitted every fact that plaintiff sought to show by using the evidence, namely, that he owned the gun and used it to kill Collings, and cannot now complain that the gun was obtained by an unlawful search and seizure in the first instance. State v. Brookshire, supra; State v. Smith, 357 Mo. 467, 209 S. W. 2d 138, 140; State v. Bray, Mo. App., 278 S. W. 2d 49, 52. In no event could the admission of the hammer in evidence have prejudiced defendant. It was defendant's theory that the hammer was used by Collings as a weapon in his alleged attack upon defendant. Certainly it would not hurt defendant's case to exhibit the hammer to the jury.

No error appearing the judgment is affirmed.

All concur.

Exhibit B.

Jefferson City, Mo., March 12, 1962.

Dear Sir:

Dorothy C. Contestible vs. W. A. Brookshire

Appellant's motion for rehearing or to transfer to Court en Banc overruled.

Appellant's motion to produce or specify particular matters ordered filed and overruled.

Very truly yours,

Marion Spicer,
Clerk.

APPENDIX C.

Pertinent Portions of United States Constitution.

Amendment IV.

Searches and Seizures.

"The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated and no warrants shall issue but upon probable cause supported by oath or affirmation and particularly describing the place to be searched and the persons or things to be seized."

Amendment V.

Rights of Persons.

"No person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property without due process of law; nor shall private property be taken for public use without just compensation."

Amendment XIV, Section 1.

Rights of Citizens.

"All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the State wherein they reside. No

State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

Amendment VI.

Rights of Accused.

"In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor and to have the assistance of counsel for his defense."

Pertinent Portions of Constitution of Missouri.

Article I, Section 30.

Due Process of Law.

That no person shall be deprived of life, liberty or property without due process of law.

Section 18 (a), Rights of Accused in Criminal Prosecutions.

That in criminal prosecutions the accused shall have the right to appear and defend in person and by counsel; to demand the nature and cause of the accusation; to meet the witnesses face to face; to have process to compel the attendance of witnesses in his behalf; and a speedy public trial by an impartial jury of the county.

APPENDIX D.

Motion to Suppress Evidence.

Comes now the Defendant for the purpose of this Motion only and represents and shows the Court:

1. That the Prosecuting Attorney of Boone County, Missouri, has heretofore filed his Information with this Court in which he states that this Defendant did on or about the 25th day of May 1959, in Boone County, Missouri, did in and upon one Ralph Collings feloniously, willfully make an assault with a deadly and dangerous weapon to wit: A .32 caliber automatic pistol . . . did kill and murder him, the said Ralph Collings. (Part of information omitted where dotted lines appear above.)

2. That on the 25th day of May 1959 this Defendant was unlawfully arrested by Theron Duncan and Pearlie Lukehart in Boone County, Missouri, prior to filing of the above affidavit in magistrate court, and this said Information, and was taken to the county jail of said County at Columbia, Missouri.

3. That on said 25th day of May 1959 while said Defendant was in said jail and away from his residence the said officers together with Sgt. Jim Runkle and Lt. J. O. Rhodes of the Missouri Highway Patrol unlawfully searched the home of this Defendant and removed certain articles located therein. That said search and seizure was made without first procuring the consent of this Defendant and without first procuring the warrant to authorize him or them or any other officer so to do. That said officers unlawfully searched said Defendant and his home residence and unlawfully seized personal contents located in this home. That among such articles unlawfully seized were a .32 Colt automatic pistol, five .32 caliber spent cartridge casings and three .32 caliber spent cartridge slugs or missiles.

4. That said officers will testify unless restrained that said articles were found in Defendant's home and were utilized in the death of said Collings.

5. That all of said property was unlawfully seized on said date by said officers and taken into their possession without legal right or authority and in violation of both the constitutional and statutory laws of this state and more particularly in violation of Article 1, Sections 15 and 19 of the Missouri Constitution of 1945. And also in violation of 4th and 5th Amendments of the Constitution of the United States of America.

6. This Defendant states that he brought a similar Motion to Suppress at his first opportunity, to wit: the preliminary hearing, and does now bring this Motion to the attention of the Circuit Court before the said articles are offered into evidence.

7. That said search and seizure was unreasonable; that same was made without probable cause; and was not supported by written oath or affirmation; was in fact made without a search warrant.

Wherefore Defendant prays the Court for an order suppressing all of the evidence obtained by the said officers or by any other person while acting with all or any of them at said time. And for an order preventing the introduction of said evidence, and for an order further, preventing the State from introducing any personal property removed from the person or home of the Defendant on said date or thereafter without having obtained a Search Warrant for same. And for an order debarring the State of Missouri from disclosing or introducing in evidence against this Defendant any information, or evidence of any kind or nature relative to the offense charged, which was so obtained by said officers or other persons acting under all or any of them.

APPENDIX E.

Assignment 16 Appellant's Motion for a New Trial (Tr. pp. 601-607).

The Defendant did not receive a fair and impartial trial for the reason that the Prosecuting Attorney, Larry Woods, bribed and connived with Harvey Beavers so that in the trial of the case said witness, among other testimony, testified as follows:

Q. By Mr. Woods: Now, when you first went into the kitchen after he called you in right after the shots were fired.

A. Yes, sir.

Q. At that time?

A. It was about—He called me up there.

Q. I understand, but wait. When you first went into the kitchen after the shots were fired. You and Mr. Hayman: Did you look at the body closely?

A. Yes, sir, I did.

Q. When you looked at the body was the hat on his head?

A. It was not the first time. No, sir.

Q. Where was the hat the first time?

A. I'd say twelve inches from the head.

Q. Was it toward the kitchen sink or toward the feet?

A. The sink is over here (indicating) his head is laying here (indicating) and his hat about twelve inches from the right——

The Court: Twelve inches from the right of his head?

The Witness: Yes, sir.

The said Prosecuting Attorney had by persuasion and by purchase secured this testimony which is in direct conflict with the testimony given by the same witness at the Coroner's inquest and is untrue.

That the Defendant has positive information that the said Prosecuting Attorney furnished money to said wit-

ness on one occasion by telegraphing money to the witness for the purpose of changing the testimony to make it appear that the hat belonged to the deceased, was taken from the floor of the Defendant's residence and placed on the deceased's head.

The Defendant since the trial of this case has submitted to a lie detector which is mentioned in another assignment in this motion and which shows positively that no part of the scene of the killing was changed after the killing occurred. That the testimony of said witness is influenced and induced by a drug given to said witness prior to his testimony. That there is contained in the Columbia Missourian for Tuesday, May 3, 1960, an account of this drug in the following language: "Too many tranquilizers. Witness 'Groggy' at Brookshire Trial. Harvey Beavers, key witness in the murder trial of W. A. Brookshire, consumed a bottle of pills with a tranquilizing effect the night before he was to testify as a State's witness, former Deputy Sheriff Pearlie Lukehart told the Missourian today. Lukehart, whose resignation as Deputy Sheriff became effective Monday, said Beavers was given the pills Monday night to correct a nervous condition and instead of following the prescription of one pill three times a day, consumed the entire contents. The pills were prescribed by a county physician. Lukehart said he discovered Beavers in a drunken-like stupor in his Ben Bolt Hotel room and poured tomato juice and coffee into him until Beavers appeared to return to normal. But observers at the trial said Beavers appeared groggy at his appearance at 9:40 A. M. Thursday as a witness. For instance, as Prosecuting Attorney Larry Woods questioned Beavers about the events on the morning of May 25, 1959, the day Ralph Collings was slain on Brookshire's farm, Beavers thought Woods was asking about Saturday, two days before. More than five minutes of testimony was heard before the two reached agreement on dates. Then Woods carefully explained he was talking about Monday, the day

of the shooting, and all his questions would be about that day. Beavers got enough of his meaning to know they were talking about a day other than Saturday. He testified that it was pouring rain on the morning in question. Woods questioned: It was pouring rain on the morning of the shooting? Beavers: No, no, it was clear on the day of the shooting. I thought you were talking about Sunday. Lukehart said a Columbia physician told him that once the taker consumed a large number of tranquilizers he lapses into a stupor. He loses his coordination and appears just like a man on a drunk. The pills are often prescribed to keep alcoholics from getting the urge for more liquor. Lukehart said the physician told him: "Beavers has returned to his home in Chattanooga, Tennessee." Brookshire was found guilty of manslaughter but says he will make an appeal. The jury recommended a sentence of three years in the state penitentiary." (Columbia Missourian, Tuesday, May 3, 1960.)

The Defendant states that Larry Woods, the Prosecuting Attorney, had for many months prior to the killing of the deceased been encouraging various individuals to break into the Defendant's home and to assault the Defendant with the understanding that there would be no prosecution of such individuals. And on one occasion assisted an individual who came from his office to the Defendant's home for the purpose of holding up and assaulting the Defendant with the promise that there would be no prosecution; that since the trial of this case, inasmuch as there was no one present when the act was committed except the Defendant and the deceased, and since the said Prosecuting Attorney introduced personal enemies of the Defendant to testify against the Defendant, the Defendant to positively establish the fact that he was telling the truth about how the act was committed and all facts surrounding the commission of the act, has submitted to a polygraph test, or lie detector test, which has demonstrated

that the Defendant was telling the truth. And has solicited the State Highway Patrol to perform the same on a similiar test. That it was agreeable to the Highway Patrol but said Larry Woods refused to give his permission or to permit the test to be made by the Highway Patrol, knowing that it would positively establish the fact that the Defendant was telling the absolute truth.

The Defendant further states that said Larry Woods, on page 26 of the Transcript of the voir dire examination, named the witnesses that the State would call and used the following language: "There are several witnesses to be called in this case. I'd like to read them to you. Theron Duncan, a deputy sheriff of Boone County, Missouri; Perley Lukehart, a deputy sheriff of Boone County, Missouri; Harvey Beavers of Chattanooga, Tennessee; Vincent Perna, the Coroner of Boone County, Missouri; Sgt. Jim Runkle of the Highway Patrol here in Jefferson City; Lt. J. O. Rhodes of the Highway Patrol here in Jefferson City; Earl Miller who is now in the Cole County jail here. I believe he is from Kansas. Now, those are the names of the witnesses that the State will call in this case."

After making this statement to the jury and to the Defendant, and without any public record of subpoena issued for other witnesses, called seven character witnesses, one of which, Scott Wright, had falsely filed an information alleging that a check which was plain on its face dated December 31, 1957 read December 31, 1956. This said Information was filed on the 8th day of May, 1957, which falsification on the part of Scott Wright acting as Prosecuting Attorney, constituted perjury. Yet this witness was called as a character witness against the Defendant.

The Defendant further states that this illegal and unethical conduct on the part of Larry Woods, coupled with the manner in which the jury was obtained and qualified, in itself warrants the Court in setting aside the verdict and granting a new trial.

APPENDIX F.

In the Supreme Court of Missouri.
Division Two.

State of Missouri, Respondent.
vs.
W. A. Brookshire, Appellant.
Number 48,488.

Motion to Produce Evidence.

Comes now the appellant and informs the Court that on February 16, 1962 he received a letter from the Clerk of this Court informing him that on February 12, 1962 that this Court had made the following order: "It is further ordered that the other paper writing filed contemporaneously therewith on January 23, 1962 purporting to be and which is entitled, 'Motion for a Rehearing, or in the Alternative to Transfer to the Court, En Banc,' and also appellant's 'Suggestions in Support of Motion for Rehearing, or in the Alternative, to Transfer to the Court En Banc', filed on February 8, 1962 be and the same are stricken from the file for the reason that they are scandalous, impertinent and scurrilous."

The appellant further informs that the Court that he has received much newspaper, radio and television publicity on account of said ruling, four days before he received official notice.

Wherefore, the appellant moves the Court to furnish to the appellant and to newspapers, radio and television, the part or parts of the motion and suggestions filed by this

appellant that constituted scandal, the part or parts that were scurrilous and what part or parts were impertinent: just who was scandalized to the end that the appellant may be afforded "due process of law" as guaranteed to him by Section 10 of Article 1 of the Constitution of Missouri and Article VI and Article One, Amendment XIV of the Constitution of the United States.

Respectfully submitted,

W. A. Brookshire,

Appellant.

APPENDIX G.

In the
Supreme Court of Missouri.
Division Number One.

Dorothy C. Contestible, Administratrix of Estate of Ralph Burton Collings, deceased,
Respondent,
vs.
W. A. Brookshire,
Appellant.
No. 48,581

Motion to Produce.

Comes now the appellant and informs the Court that on February 16, 1962 he received from the Clerk of this Court an order that purported to be made February 12, 1962, relative to the above styled case which order contained the following "suggestions in support of appellant's motion for a rehearing or in the alternative, to transfer to court en banc, filed by W. A. Brookshire, stricken as scandalous and scurrilous"; that this ruling was given to the public press, the radio and television and the appellant has been unjustly accused and maligned, before he was furnished a copy of the Court's ruling.

Wherefore, the appellant moves the Court to designate the portion or parts of said suggestions that were scandalous and what portion or statements were scurrilous for the reason the appellant is entitled to know what charges of scandal he is accused of committing and is entitled to know what allegations he employed that were scurrilous and, just what part of the suggestions constituted slander

and just what part or parts were scurrilous in that this Court has failed to definitely confront the appellant with charges which deny to the appellant "due process of law" as guaranteed to him by Amendment 14 of the United States Constitution and has failed to confront the appellant with charges preferred against him.

That this Court make an order or finding definitely and succinctly stating facts that warrant the order made by this Court for the reason this appellant has been publicized, maligned and castigated by the public press, the radio, and television in violation of his rights as guaranteed to him by the Constitution of Missouri and the Constitution of the United States, particularly Amendment VI and Article 1 of Amendment XIV and Section 10 of Article I of the Constitution of Missouri.

Respectfully submitted,

W. A. Brookshire, Appellant.

EXHIBIT H.

In the Supreme Court of Missouri, En Banc.

March Session, 1962.

In Re: W. A. Brookshire Case No. 49,031.

Comes now the accused and moves the Court to set aside its order made and entered March 6th, 1962, which order is in words and figures as follows:

"The Court, having heretofore on the 28th day of August, 1961, entered its order holding in abeyance the motion filed in this Court by the Bar Committee for the 13th Judicial Circuit of Missouri wherein it requested that W. A. Brookshire be removed from the roll of Attorneys in this State, did take the said motion up for further consideration on February 28th, 1962, and the matter, having been argued by the movants and the respondent, was taken under submission:

It now appearing to the Court that the appeal of the said W. A. Brookshire from the Circuit Court of Cole County, Missouri in Cause No. 48,488 entitled State of Missouri, Respondent vs. W. A. Brookshire, Appellant, has been determined by judgment of this Court affirming his conviction for manslaughter, said judgment being rendered on January 8, 1962 and now being final.

Now therefore, the Court finds that W. A. Brookshire has been convicted of an offense involving moral turpitude and said conviction is final; and, it is ordered and adjudged that the name of W. A. Brookshire be stricken from the roll of Attorneys and that he be and is hereby disbarred.

Henry J. Westhues, Chief Justice."

For the Following Reasons:

1. That on February 12th, 1962, this Court made and entered the following order, No. 49,631, In Re: W. A. Brookshire,

Now at this day, it is ordered that the motion of the 13th Circuit Bar Committee to remove W. A. Brookshire from the practice of law be docketed for hearing and final disposition (Under Section 484.240, Rev. Stat. Mo., 1959 and Supreme Court Rule 4.47) on Wednesday, February 28, 1962 at 10 A. M. It is further ordered that said Attorney and George Miller, his trustee, and the Members of said 13th Circuit Bar Committee be given 10 days notice of said hearing by registered U. S. Mails; and on February 13th, 1962 the following notice was mailed by the Clerk of this Court, "Mr. Howard B. Lang, Jr., 1817 West Broadway, Columbia, Missouri".

Dear Sir:

Enclosed is a certified copy of the Court's order in the above entitled cause made February 12th, 1962.

Yours very truly,

s/ Marion Spicer.

cc: Mr. Fred B. Hulse, 201 Sedalia Trust Bldg., Sedalia, Missouri; Mr. John M. Cave, Fulton, Missouri; Mr. Philip A. Grimes, Exchange National Bank Bldg., Jefferson City, Missouri; Mr. Robert C. Smith, 901 E. Broadway, Columbia, Missouri; Mr. W. A. Brookshire, Box 7900, Jefferson City, Missouri; Mr. Richard K. Phelps, 210 Altman Bldg., Kansas City, Missouri.

2. That Section 484.240 provides as follows:

"Removal or suspension without trial."

"If the charge allege a conviction for any criminal offense involving moral turpitude, the court shall on production of the record of such conviction, remove the attorney so convicted or suspend such attorney from practice for a limited time, according to the nature of the offense as the court may deem just and without further trial."

That Rule 4.47 provides as follows:

"General Rule governing certain conduct of lawyers."

"A lawyer should always maintain his integrity; and shall not wilfully commit any act against the interest of the public; nor shall he violate his duty to the courts or his clients; nor shall he by any misconduct commit any offense against the laws of Missouri or the United States of America, which amounts to a crime involving acts done by him contrary to justice, honesty, modesty or good morals; nor shall he be guilty of any misconduct whereby for the protection of the public and those charged with the administration of justice he should no longer be entrusted with the duties and responsibilities belonging to the office of an attorney."

3. That such charge against the accused entitled him to a hearing under Section 10, Article I of the Constitution of the State of Missouri and Amendments 5 and 14 of the Constitution of the United States; that in defense of the charge filed by this Court as aforesaid, the accused addressed a letter dated February 21st, 1962, to the Clerk of this Court as follows:

Dear Sir:

I am enclosing a list of witnesses I want subpoenaed in W. A. Brookshire, No. 49,631. I shall want to attend the hearing and to examine witnesses.

Very truly,

/s/ W. A. Brookshire.

P. S. You are instructed to issue subpoenaes Duces Tecum for the documents I have listed. W. A. B.

That the following witnesses were listed:

1. Judge Sam C. Blair, Jefferson City, Missouri.

2. Mr. Guy M. Sone, Circuit Clerk, Jefferson City, Missouri and subpoena for court files in State v. Brookshire.

3. Louis Bredeman, Jefferson City, Missouri, with notes in State v. Brookshire.

4. Larry Woods, Columbia, Missouri, with statement of Harvey Beavers dated May 25, 1959.

5. Lyman Cleek, Guitar Bldg., Columbia, Missouri.

6. Neil McKay, Jefferson City, Missouri.

7. Deputy Sheriff Smith, Court House, Jefferson City, Missouri.

8. Paul Wolfrum, Kroger Store, Jefferson City, Missouri.

9. Judge L. M. Hyde, Jefferson City, Missouri.

10. Judge Westhues, Jefferson City, Missouri.

11. Judge Dalton, Jefferson City, Missouri.

12. Judge Frank Hollingsworth, Jefferson City, Missouri.

13. Judge L. Holman, Jefferson City, Missouri.

14. Judge Norman Hauser, Jefferson City, Missouri.

15. Judge C. A. Leedy, Jefferson City, Missouri.

16. Judge Clem Storkman, Jefferson City, Missouri.

17. Marion Spicer, Clerk, Missouri Supreme Court, with transcript 48,888, Jefferson City, Missouri.

18. Roger Hall, Route 1, Columbia, Missouri.

19. Robert Wren, Ashland, Missouri.

20. Scott Wright, Columbia, Missouri.

21. L. M. Pitts, Ashland, Missouri.

22. Harvey Beavers, c/o Larry Woods, Columbia, Missouri.

23. Major Black, Ashland, Missouri.

24. L. H. Wilburs, Jefferson City, Missouri.

25. James Riley with files of W. A. Brookshire, Jefferson City, Missouri.

26. Paul Sapp, Ashland, Missouri.

27. Ralph Smallwood, Jefferson City, Missouri.

28. Carl Lunwalt, Ashland, Missouri.

29. Fred Hilgedick, Hartsburg, Missouri.

30. Editor, News Tribune, Jefferson City, Missouri, with issues for May 25-26-27, 1959.

31. Ralph Alexander, Columbia, Missouri.

32. Bill Griggs, Columbia, Missouri.

33. Doctor Perna, Coroner of Boone County, with transcript of Coroner's inquest, Columbia, Missouri.

34. Pearlie Lukehart, Columbia, Missouri.

35. Lt. Rhoades, Missouri Highway Patrol, Jefferson City, Missouri.

36. H. J. Waters, Editor, Columbia Tribune, Columbia, Missouri.

That the accused received the following letter from the Clerk of this Court February 23rd, 1962:

Mr. W. A. Brookshire
Register Number 04035
Box #900
Jefferson City, Missouri

In Re: W. A. Brookshire,
No. 49031.

Dear Sir:

The Court has this date made the following order in the above entitled cause.

Request of W. A. Brookshire for personal appearance on February 28, 1962 sustained.

Request for issuance of subpoenas denied. See Section 484.240, V. A. M. S., Rev. Stat. Mo., 1959.

Yours very truly,

/s/ Marion Spicer, Clerk.

Copy to:

Mr. John M. Cove, Fulton, Missouri; Mr. George C. Miller, 3 North Eighth Street, Columbia, Missouri; Howard B. Lang, Jr., 1817 West Broadway, Columbia, Missouri; Philip A. Grimes, Exchange National Bank Building, Columbia, Missouri.

That the accused appeared before this Court on February 28th, 1962, at which session no evidence of any character was introduced or offered against the accused; that the accused requested a hearing to the end that he might offer evidence to refute and disprove the so-called charges against him; that the Court adjourned without making an order permitting the evidence tendered by the accused or an order denying said evidence; that without a further hearing of any character, this Court made and entered the order heretofore pleaded in full.

4. The accused further states that if the witnesses he requested had been subpoenaed they would have testified as follows:

A. Judge Sam C. Blair: that he was the Judge who presided in the case 48488; that the defendant filed a motion to suppress evidence and a hearing was held with Theron Duncan, Pearlie Lukehart and Coroner Vincent Perna testifying and that he overruled it. Tr. 19-22 and 23; that a motion to produce the statements made to the prosecuting attorney by Harvey Beavers, May 25th, 1959; that the evidence of Larry Woods was offered and the same was overruled. Tr. 22-23; that a motion to quash the information was argued and overruled. Tr. 22-23; that he called the attorneys into his office during the trial and stated "I want the State to prove its case, but in so doing, I don't want the State to get itself in trouble" and "now wait a minute, you say these two particular wounds, why don't you include in the question which wounds; this case might sometime be looked at by another court, Tr. 391"; that he supervised the preparation of the transcript; that he conferred with the foreman of the jury while the case was being considered by the jury; and that he had an instruction which the court files show was not given to the jury to be inserted in the transcript; that he knew that a deputy sheriff was selecting jurors who were enemies of the accused, especially Paul Wolfrum; that he personally assisted in the securement of a jury that would convict the accused.

B. Guy Sone would have produced the court files that would have shown that an instruction was not in the files and that the files had been tampered with by Judge Blair.

C. Louis Bredeman, would have testified that he was instructed by Judge Blair just what should be included and what was to be omitted from the record; that he omitted

from the record evidence favorable to the accused at the suggestion of Judge Blair.

D. Larry Woods, would have testified that a statement given him by Harvey Beavers, May 25, 1959, would have shown that the accused killed the deceased while acting in defense of his life and of his home; that he sent a deputy sheriff named Duncan on May 25, 1959, to the cell where the accused was confined and told the accused if he would pay Beavers and Hayman ten dollars each, they would leave the State; that after the accused refused to pay any amount, a warrant was issued and served upon accused; that the witness sent money to Harvey Beavers and hired Beavers to falsely state that the hat was not on the head of the deceased when Beavers first saw him; that the witness together with Pearlie Lukehart administered a narcotic to the end that Beavers would be so confused that he committed perjury as a state witness; that he paid to Harvey Beavers the sum of $75.00 to cause Beavers to commit perjury and after the accused was convicted, demanded that Beavers assign his witness fees and mileage to Larry Woods; that the witness, Larry Woods connived with Lyman Cleek who was defending the accused to improperly defend the accused in that evidence favorable to accused was not offered; that witness Woods connived with reputation witnesses to falsely testify that the accused reputation for telling the truth was bad and connived with said Lyman Cleek to refuse to cross-examine said witnesses; that witness Woods connived with deputy sheriff Smith and James Riley in the summons of a juror who would agree to falsify facts that were damaging to the accused.

E. Lyman Cleek, that he came to the accused about April 15, 1960 and told the accused he wanted to represent him; that on April 23, 1960 accused gave him a check which he altered and on April 26, 1960 accused gave him

another check which Cleek had his wife to alter; that he assisted the state in scratching the jury; that he refused to cross-examine the Coroner and Harvey Beavers as directed by the accused; that he refused to permit accused to cross-examine the reputation witnesses and then failed to cross-examine all of such witnesses, except three; that in his argument to the jury he stated that the accused was "a lot of fake"; that the accused was "a lot of things" and stated that the reputation witnesses were "those good people"; that he failed to prepare a motion for a new trial; that he and his father-in-law, Charles Foster stole more than forty head of accused's calves while the accused was confined to his room and bed caused by a robbery of accused; that he wanted the accused convicted.

F. Neil McKay: That he was foreman of the jury that tried accused and conferred with the trial judge, Sam Blair, while the jury was deliberating and carried from the Court House the instructions given by the court; that the verdict of the jury was dictated by people not serving on the jury.

G. Deputy Sheriff Smith, will testify that he was instructed to bring in prospective jurors who would convict the accused, particularly Paul Wolfrum, Neil McKay and others.

H. Paul Wolfrum, will testify that he was summoned and instructed by deputy sheriff Smith, Judge Blair, James Riley and Larry Woods to state that the accused had given him a bad check for twenty-five dollars, which statement was untruthful.

I. Judge L. M. Hyde, will testify that he acquiesced in the prejudice that existed against the accused.

J. Judge Westhues, will testify that much prejudice existed against the accused.

K. Judge Dalton, will testify that he greeted and put his arm around Joe Swink at the Governors Hotel shortly after the case of Pogue et al. v. Joe Swink had been argued in this Court; that he is prejudiced against accused.

L. Judge Frank Hollingsworth, will testify that he knows the accused was a truthful man when both served in the State Senat in 1925; that he simply acquiesced in the prejudice that exists against the accused.

M. Judge L. Holman, will testify that he dislikes the accused.

N. Judge Norman Hauser, will testify that he hates the accused, and refused to sit as a commissioner on the St. Louis Court of Appeals while accused was making arguments in said court.

O. Judge Leedy, will testify that he did not treat accused with respect in the case of Brookshire v. Glenn Powell, et al., which case was decided by Division No. 2 of this Court.

P. Judge Storckman, will testify that he knows that the accused is a lawyer with considerable ability and is a truthful man; that he acquiesced in the opinion because of prejudice that exists against the accused.

Q. Marion Spicer, will produce the transcript 48,488 to the end that the accused and this Court may compare it with the notes produced by Louis Bredeman, the court reporter.

R. Roger Hall, will testify that he is a vicious enemy of the accused; that he has killed and wounded many animals belonging to the accused; that he has stolen grain and animals from the accused; that he would slip to the farm hands of accused and urge them to leave and to physically attack the accused; that on Friday, May 22nd, 1959, he went to the deceased Ralph Collings while accused was away and instructed Collings to attack the accused.

AA. Robert Wren would testify that he and two farm hands of accused stole hogs from accused's field and that he has stolen cattle belonging to accused; that he hates the accused and has falsely testified about accused.

BB. Scott Wright will testify that on May 8th, 1957 he committed perjury as prosecuting attorney of Boone County, by making a false oath before the Circuit Clerk, that a check drawn by the accused and made payable to Woodrow Wilson, the County Collector of Boone County in the sum of $728.00 was dated December 31, 1956, when the check showed on its face that it was dated December 31, 1957; and has committed perjury by testifying in Case No. 48,488, that accused's reputation for truth and veracity was bad.

CC. L. M. Pitts will testify that he committed perjury when he testified that the accused had a bad reputation for telling the truth.

DD. Harvey Beavers will testify he was under the influence of dope and narcotics given him by Larry Woods, the prosecuting attorney, and Pearlie Lukehart; that he committed perjury when he testified that he saw the body of the deceased when his hat was lying on the floor, and that this testimony was paid for by Larry Woods and others; that he was at the barn a distance of at least 150 feet from the house where accused was shot; that he does not know whether the deceased had a hammer when he was seen by the accused outside of accused's home; that he committed perjury solely because Larry Woods and others paid him to do so; that Lyman Cleek knew he was under the influence of narcotics and drugs when he testified at the trial of accused; that he told accused in East St. Louis, shortly after he had testified that he committed perjury by being paid by Larry Woods; that he made a written statement on the afternoon of May 25, 1959, while the accused was imprisoned, which statement was

given to Larry Woods in which he set forth all he knew about the killing of Ralph Collings; that he is willing for the statement to be delivered to this Court.

EE. Major Black, that he has stolen hogs and cattle that belonged to accused; that he committed perjury when he testified as a reputation witness against accused.

FF. L. H. Wilburs, he would testify that he was employed by accused to assist in selecting a jury for the sum of fifty dollars; that he insisted over the wishes of the accused, that Ralph Smallwood be left on the jury and stated that Smallwood was an employee of Wilburs' father-in-law, the owner of Sav-More Supermarket; that Wilburs guaranteed that Smallwood would never vote for conviction if he, Wilburs was an attorney for accused; for this guarantee Wilburs was employed for a fee of $250.00 to remain for accused; this was done solely because of Wilburs' guarantee; that Wilburs, during the summer of 1961, informed the accused that he had heard that Neil McKay, foreman of the jury, conferred with Judge Blair during while the jury was deliberating.

GG. James Riley would testify that he knew the Deputy Sheriff Smith summoned Paul Wolfrum for the sole purpose of stating untruthfully that the accused had given Wolfrum a bad check for $25.00, that Judge Blair used every effort to secure a conviction by coaching the prosecuting attorneys in the trial of the case.

HH. Paul Sapp, this witness would testify that he committed perjury when he testified as a reputation witness against accused.

II. Ralph Smallwood would testify that at the time he served on the jury he was an employee of the owner of Sav-More Supermarket and that L. H. Wilburs was a son-in-law of said owner.

JJ. Carl Zumwalt would have testified that he committed perjury when he testified that accused had a bad reputation for truth and veracity.

KK. Fred Hilgedick would have testified untruthfully about accused's reputation solely because he swindled the accused and because he was a hired witness.

LL. The Editor of the News Tribune would have stated that he committed libel by printing on May 25th, 1959 that accused shot Ralph Collings in the back three times, and committed perjury by publishing on that date that accused farm was run down and accused's home was dog-guarded; that the paper was or has a wide circulation in Jefferson City and Cole County; that he knew James Riley, Judge Blair and Larry Woods conspired with Deputy Sheriff Smith in having prospective jurors summoned who would convict accused without regard to testimony.

MM. Ralph Alexander would have testified that he used perjured testimony in an effort to obtain title to accused's valuable farm for a small sum; that he visited the court on Monday, April 25th, 1960 on the morning the case against the accused was commenced and that he provided funds for corrupting a jury and Lyman Cleek, the attorney for accused.

NN. Bill Griggs, would have testified that he was used by Ralph Alexander and Glenn Powell in securing the appointment of George Miller as trustee of accused estate to the end, that appeals by accused could be stopped and the property of accused could be obtained in violation of Section 10, Article I of the Missouri Constitution and Amendments 5 and 14 of the Constitution of the United States.

OO. Doctor Perna, would have testified that he came to the home of accused and assisted in the arrest and removal of the accused from his home and assisted in a

search of accused home without a search warrant, more than two hours after accused had been illegally arrested and cast into jail; that he had been sued by accused for an illegal arrest and an illegal search; that he found all wounds inflicted upon deceased had been inflicted from the front; that he did not know how long deceased lived after being wounded or how many steps he took after being shot; that he guessed the weight of deceased and made a false measurement of his height; that the testimony given at the inquest by Harvey Beavers differed from that given by Beavers at the trial.

PP. Pearlie Lukehart, would have testified that he assisted in the arrest and hand-cuffing and imprisonment of accused without knowing any facts that would have warranted such an arrest all without a warrant and assisted in the search of accused home more than two hours after accused was illegally removed from his home without a warrant and after accused had forbidden a search without a warrant; that he had removed all finger prints from the five pound sledge hammer found near the head of deceased; that he committed perjury in stating that the hammer handle was covered by papers when he first arrived at accused's home; that he had been sued three times by the accused for libelling accused and for an illegal arrest and an illegal search and that he was an enemy of the accused.

QQ. Lt. Rhoades, would have testified that he assisted in an illegal search of accused's premises and helped steal ammunition to test-fire the gun illegally seized from accused's home; that he found that deceased had been shot from the front and had been shot in the upper right arm and he found that there was human blood on the handle of the hammer handle; that he found blood on the floor of the dining room, more than four feet from the feet of deceased where he was lying which testimony showed

that deceased moved more than four feet after he was fatally shot; that all empty shells were found more than 14 feet from the kitchen door where the deceased had broken open to gain entrance to accused's home; that from his findings the accused and deceased were facing each other when the shots were fired in the dining room of accused's home; that he had removed the gun from a dresser drawer in an upstairs room of the accused's home more than forty feet from where the body of the deceased was lying and more than three hours after accused had been removed from his home; that the accused offered to take a lie detector test.

J.J. H. J. Wafers would have testified that he has libelled accused for several years through the paper he edits and publishes the Columbia Tribune; that he had connived with Larry Woods and Lyman Cleek for the purpose of convicting through perjury and adverse opinion, the accused.

4. The accused further states that the testimony which would have been adduced by the above named witnesses, coupled with accused's testimony, would be sufficient to prove beyond a reasonable doubt, that the accused committed no offense, but was justified in taking the life of the deceased, that such testimony would disprove a charge of moral turpitude. Webster defines moral turpitude in the following language: "The quality of a crime involving grave infringement of the moral sentiment of the community as distinguished from statutory mala prohibita." It is unthinkable that the killing of a man in defense of one's life and home, involves moral turpitude.

5. The accused files herewith a motion he attempted to file in Division Two, which motion contains fourteen assignments of mis-statements of testimony in the opinion

filed by Division Two on January 8th, 1962; that regardless of the hatred and disrespect this Court possesses for accused, "due process of law" as provided in Section 10, Article I of the Constitution of Missouri and Amendments V and XIV of the Constitution of the United States, demands fairness and due respect for the rights of a man held in disrepute and hatred, that said opinion should be revised to speak the truth as requested in said motion filed herewith and made a part of this motion for a hearing.

The accused contends that he is entitled to have an order of March 6th, 1962 set aside and a hearing granted for the reason Section 484.240 is unconstitutional in that it takes a valuable property and personal rights without "due process of law" as guaranteed in Section 10, Article I, Constitution of Missouri and Amendments V and XIV of the Constitution of the United States, and for further reason that this Court has denied the accused "due process of law" as above specified in denying an acquittal or a new trial, through misquoting the testimony contained in the transcript in the following instances:

1. On page 3 of the opinion filed January 8th, 1962, relative to a motion to suppress evidence this Court said: "The record preserves no evidence or proof offered in support of said motion." And on page 5 relative to a motion to produce a signed statement of Harvey Beavers, made the day of the killing, this Court said: "But there is no evidence or proof offered in connection with said motion."

The Attorney General in his brief filed on pages 2-3-5 and 6, stated that hearings had been held by the trial court on both motions. The transcript, page 4, motion to suppress evidence, is filed by the defendant on the grounds that evidence was obtained by illegal search and seizure. Whereupon said motion was by the court

heard and overruled. Page 23, "and thereafter, on the same day, April 26th, 1960, motions to quash information, to produce and to suppress are presented to the court, and the court having considered the **evidence** and being fully advised in the premises, overruled motions of defendant as follows: Motions to suppress evidence, motion to quash information and motion to produce." See pages 19-22 and page 236 Tr.,

Mr. Cleek: Your Honor, while they are doing that, I would like to ask a few preliminary questions as to the admissibility of some of the things——

The Court: Are you raising the questions as heretofore raised preliminary to trial?

Mr. Cleek: Yes.

The Court: Hasn't that been adjudged?

Mr. Cleek: I believe that it should be raised again.

The Court: **I think not. You have got the question squarely lodged in the case and it is not a matter for the jury to decide. It is for me to decide.** Tr. 236.

These records clearly disprove the statements contained in the opinion. The testimony of the witnesses, Duncan, Lutzehart, Perna, Rhoades and Brookshire clearly furnishes abundant evidence to support motion to suppress and, to establish the fact that Constitutional Rights of the accused are guaranteed to him by Amendment IV, Constitution of the United States and Article I, Section 15 of the Constitution of Missouri, and Mapp v. Ohio, 81 S. Ct. Rep. 1684, page 3 of the opinion. "Furthermore, defendant voluntarily testified at the trial that he got **this gun** and shot Collings." This statement **this gun**, was never used by the defendant, consult the record.

Page 3 of the opinion, "the state contends it was manslaughter". This statement is untrue, gentlemen, a man who does something like **this is a menace to our community and we want to get rid of him. Now the maximum**

punishment in this case is life imprisonment, and the state feels that this man has been found guilty of second degree murder, and that the elements are premeditation.

Tr. Page 580, "**I say gentlemen, that the facts in this case are conclusive. It does show a heart bent on fatal mischief**, Tr. 581.

This argument proves beyond a doubt that Larry Woods did not contend it was manslaughter. The accused is again asking, "who wrote the opinion"?

There is no showing of any improper action excluding negroes from the panel, opinion, page 5.

Mr. Cleek: Will you admit so I won't have to put any testimony on, will you admit there are no negroes on the jury panel?

Mr. Woods: Yes.

Mr. Cleek: Will you admit none have been subpoenaed on this?

Mr. Woods: I think it is true. I will admit that, Tr. page 123.

It is easy to see why no one would admit he wrote such an opinion.

"The back porch is south of the kitchen," opinion, page 6. It will be disclosed **by reading** the transcript that the back porch is directly east of the kitchen. Of course, when the accused was placed in the penitentiary by unadulterated prejudice, directions really do not matter.

Opinion, page 6, states: "Collings was 5 feet 4 inches tall weighing about 135 pounds, a pretty spry old man, smaller than defendant". A careful reading of the record will disclose that no one testified as to weight, height or the physiognomy of the accused. History records that Napoleon was not as high as the deceased. I am sure the Court remembers a member of this Court who was no

taller than the deceased. The accused wishes that the miniature judge had written the opinion in our case. Suffice it to say, that the verdict would not have been affirmed. The man who wrote this unsound opinion undoubtedly hated the accused.

"On the way to the farm from St. Louis, where Beavers was hired, the defendant told him Collings was 'so weak he can't harness the horses'", opinion, page 6. As Al Smith would have said, "let us look at the record." As confused as Beavers was from being doped by the prosecuting attorney, he did not testify to this untruthful statement. On page 342 appears the following:

Q. Did he say anything about the hired hand he had at the farm?

A. Well, a time or two he said he was an old reprobate and he said don't let us forget to get him some wine "he says" he is so weak he can't harness the horses.

Mr. Cheek: You didn't know who he was talking about?

Witness: **No, sir, I don't know.**

Q. By Mr. Woods: At that time, did you know later who he was talking about?

A. **He never told me about how weak he was.**

Can this Court tell why just such an attempt was made to justify affirming the judgment?

"Beavers then working about thirty **feet away**," opinion, page 7, this statement is untrue. Beavers testified he was working at the barn when he heard noises.

Q. Before anything happened where were you working?

A. Down at the barn.

Q. About how far from the house was that?

A. **Well, I would say a hundred feet.**

Just why was this testimony falsified by the writer of the opinion? "Defendant removed his shirt and had them look where he said Collings had struck him with the

hammer on the back of his right shoulder. Beavers could see nothing wrong with defendant's shoulder," opinion, page 8. Beavers answer was, "No, sir, you take a fat person you can't tell nothing about them." Is "per curiam" trying to say the accused lied when he testified Collings struck him a glancing blow on the right shoulder? This sounds like Larry Woods wrote the opinion.

"The first time Beavers entered the kitchen Collings' 'hat was about twelve inches from his head' but it was on his head the second time Beavers was in the kitchen," opinion, page 8. (This is an absolute lie. The accused took a lie detector test which definitely disproves this (Tr. 608-609-610 and 619).

Why was this testimony quoted? What does it matter where the hat was? The only thing that was important was whether or not Collings illegally entered the home of the defendant and assaulted him with a five pound sledge hammer. If he did, the killing was not a crime, it did not involve moral turpitude. An honorable reading of the testimony will convince any fair minded individual that the killing was done by an honorable man in his own home, and was not a crime of any character.

"Saturday, May 23, after arguing, defendant and Collings went to St. Louis, returning about midnight," opinion, pages 6 and 7. There is not a word of truth in this statement. There is nothing upon which such a statement can be based (Tr. page 352).

"Q. Now I believe you testified that on the next day it would be Saturday, that Ralph Collings and Mr. Brookshire got in the car and made a trip some place?

A. They did. I don't know where they went though."

"Collings after complying with defendant's request to show Beavers and Hayman what to do at the barn, was entitled to return to obtain his suitcases which were in

defendant's house," opinion, page 14. Not one word of testimony supported this untruthful and libelous statement, Beavers testified.

"Q. Did you ask Mr. Brookshire about those suitcases?

A. I did. I asked him how come the suitcases are here, and he said I brought them in here, Tr. pages 335 and 338.

Q. Did you ask Mr. Brookshire why he moved the suitcases in the dining room?

A. No, sir, I did not" (Tr. p. 338).

Why is the decision in this based upon untruthful statements?

Just why were the suitcases not offered in evidence? They were stolen by the deputy sheriff Lukehart. Any statement to the effect that the accused did anything improper with the suitcases, the hat or any other thing is a defamatory, libelous statement.

"Defendant testified Collings had the hammer in his hand while in the yard. Beavers testified Collings did not have the hammer, didn't have anything in his hand while outside the house," opinion, page 8. Why is this statement made? Does anyone attempt to say that the accused committed perjury? If so, it is a contemptible libel. Beavers did not testify. He was so groggy that he testified as follows:

"Q. Ralph Collings was looking up towards the house and you say he wheeled and turned said, 'if I don't get my money there is going to be one dead son-of-a-bitch'. Just why were the suitcases not offered in evidence?" They were stolen by the deputy sheriff Lukehart, any statement to the effect that the accused did anything improper with the suitcases, the hat or any other thing is a defamatory libelous statement.

"Defendant testified Collings had the hammer in his hand while in the yard. Beavers testified Collings did not

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have the hammer, didn't have anything in his hand while outside the house.'" Opinion p. 8. Why is this statement made? Does anyone attempt to say that the accused committed perjury? If so it is a contemptible libel. Beavers did not so testify. He was so groggy that he testified as follows:

"Q. Ralph Collings was looking up towards the house and you say he wheeled and turned said 'if I don't get my money there is going to be one dead son-of-a-bitch' and did he say this while he was wheeling and——.

A. wheeling and turning.

Q. Then when he wheeled and turned did he retrace his steps back to the back part of the house?

A. I don't know whether he retraced them or not, he took off around there." Tr. 362.

"A. Well, we was at the barn at that time when we heard the shots" Tr. 361.

"Q. And after you heard this racket this furniture and so forth what it sounded like what was the next thing you heard?

A. I heard some shots. **I don't know whether they were shots or not.** Said bang, bang, bang. I don't know whether they were three or four."

This testimony clearly shows there is **no basis** whatever for the statement in the opinion.

These false statements and inaccurate comments conclusively shows how the Court arrived at the conclusion that the judgment should be affirmed, both divisions of this Court worked in unison. Division one in the case of Contestible v. Brookshire, 48,581, this division on page 8 of their decision said, "The jury however, had the right to disbelieve State v. Brookshire, Sup. ... S. W. 2d ..., handed down concurrently herewith and evidently did disbelieve defendant's testimony in justification, and given defendant's admissions that he shot and killed a mild and

innocuous person. There was nothing left but defendant's account of the foregoing trivial disagreements to justify the killing."

It is submitted that no other decisions have been decided by this Court or any other Court that so flagrantly and disgracefully determined the issues.

The accused contends that the two opinions plus the order herein complained of are in direct violation of the rights of the accused as defined in Amendments IV V, and XIV of the Constitution of the United States and Secs. 10 and 15 and 18 (a) of the Constitution of the State of Missouri.

Wherefore the accused prays the Court to set aside the order herein complained of to the end that a hearing may determine the rights of the accused as guaranteed to him.

Respectfully submitted,

W. A. BROOKSHIRE,
Accused.